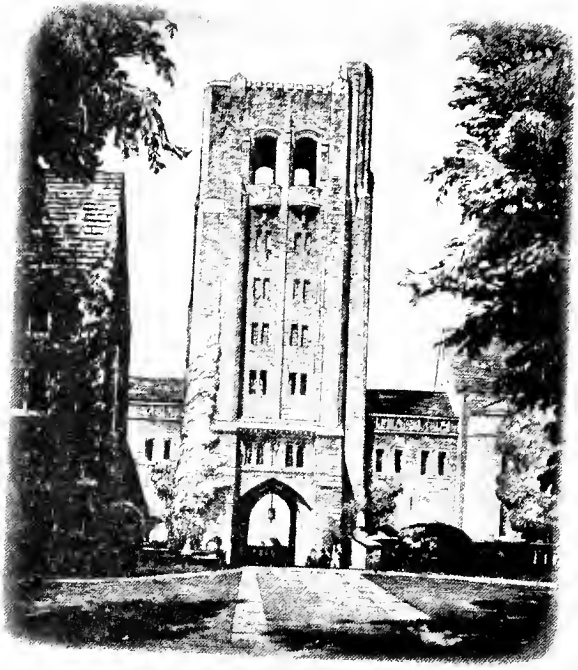

ESSAYS

IN

LEGAL ETHICS

BY

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To

HON. THOMAS DENT,

OF CHICAGO, ILL.,

who, in his life and character, has so fully expressed the professional ideal, this book is inscribed by

THE AUTHOR.

PREFACE.

This little book is a compend of lectures delivered at various times to my own students and has been produced in response to numerous requests for publication. I have endeavored to treat the subject as an integral part of undergraduate study and to confine it within the lines of the regular law course. But little space has been devoted to ethical theory, the design of the work being rather an exposition of ethical precept, and only the practical phases of accepted modern theories have been presented. To a large extent professional conduct, like all other forms of ethical affirmation, is a matter of opinion, yet, in many of its manifestations, we may discern underlying principles that seem to compel the rule. Whenever possible I have endeavored to show this principle in connection with the rule that is founded upon it. In stating a rule or precept I have uniformly presented that which seems to have received the largest amount of adherence and whenever opportunity offered have reinforced same by a citation of judicial authority. These latter op-

portunities have necessarily been few. In the main, the ethical code of the legal profession has not been the subject of either legislative or judicial action, nor can it ever become such.

I do not offer this book as a treatise on moral duties, nor do I assume the character of a teacher of morals. It purports to be, and is, nothing more than a series of brief suggestions relative to professional conduct, and as such it is submitted to those for whom the subject may possess interest.

G. W. W.

Chicago, February 1, 1902.

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ESSAYS IN LEGAL ETHICS

CHAPTER I.

PRELIMINARY OBSERVATIONS.

Introduction—Primary Conceptions—Ethics defined—Derivation—Fundamental notions—General ethical theories—Opposing schools of ethical thought—Law and morals distinguished — Morals and ethics distinguished—The standard of morals; conscience; public opinion—Obedience to law a moral duty—Authority of public opinion—Legal ethics, defined and distinguished—Scope and classification of professional duty.

1. INTRODUCTION. It has long been customary, for writers of books intended for the use of students of the law, to refer in a vague and general way to a certain abstraction, which, for want of a better name, finally came to be called "legal ethics." Not infrequently these writers, by the employment of concrete examples, have endeavored to explain their conceptions of the character of this indefinite quantity, and from these examples we find that the term is now employed to connote the ideas that are ordinarily involved in the word *duty*. In other words, that it is a compendious expression indicative of what, under given circumstances, should or should not be done, and, by some

writers, its meaning seems to be further extended so as to include the reasons which underlie such action or forbearance.

2. Again, we often hear the actions of practitioners condemned as being "contrary to the ethics of the profession," and occasionally attorneys are suspended from practice, or disbarred, not for the infraction of any law, but for a violation of "professional ethics," and this seems to mean, when translated into the vernacular, "conduct unbecoming a lawyer and a gentleman." It would appear, therefore, that two phrases are current in professional circles which indicate the same thing, i. e., *conduct;* and while the writer's own judgment would have led him to adopt as a title for this work the term "professional ethics," as more clearly indicative of what is really meant, yet the first mentioned expression, having become imbedded in court rules and judicial decisions, has been chosen as the one in more popular use.

3. For many years the importance of this subject, as a special undergraduate study, has been urged by learned and influential lawyers and legal educators,[1] and, as the study of Moral Philosophy obtains a place in the curriculum of every literary college, so, it is contended, the study of Legal Ethics should be given a distinct position in the courses of the law school. The result of this agitation has

[1] See, Rep. Committee on Legal Education to Am. Bar Assn, 1895, p. 16.

been that, in many states, legal ethics is now a required study, while it is supposed to receive more or less attention in every state.

4. ETHICS DEFINED. Before attempting to discuss our subject it may be well for us to ascertain, if possible, just what is meant by the general term "ethics," to which, with doubtful propriety, we have prefixed the qualifying word "legal." This, however, will be a matter of considerable difficulty; indeed, we shall hardly be able to arrive at a lucid and yet concise definition, as the ideas involved in the term seem to be inseparably connected with both theology and politics, and, while some writers claim to have effected their separation, others contend that all three are indissolubly blended. As there is no determinate authority by which the question can be settled it resolves itself into a matter of individual opinion.

5. In tracing the derivation of the word we find that it originally meant character, or that which relates to character as distinguished from intellect.[2] This primitive meaning it did not long retain, however, for the works of the early Greek writers,[3] to which the term was first applied, are not concerned with character, considered simply as character, but with its good and bad qualities; and the antithesis of "good" and "bad," in some form, is involved in all ethical affirmation and constitutes

[2] Sidgwick's Hist. Ethics, 1.

[3] Plato, Aristotle, and the Greek philosophers generally.

the distinguishing feature which serves to separate ethics from other departments of psychical inquiry.

6. The fundamental concepts of ethics seem to have reference to the position and relations of man as a free and intelligent being, and the good that may be accomplished by, through and for him. Upon this foundation have been erected many theories, systems and schools of thought, but from all of these systems we may fairly draw one broad conclusion, and this we may formulate in the following definition: Ethics, is the sum of the aggregate of the rules of duty,[4] or right living. This may or may not coincide with the definitions found in some of the technical treatises, but it does quite fully express the notion represented by our term "legal ethics," and hence, it is sufficient for our purpose.

7. GENERAL THEORIES OF ETHICS. As previously remarked, the science of ethics, being purely speculative, has produced many varieties and shades of opinion. A favorite theory with many of the philosophers is that ethics is an exposition of the moral law as distinguished from the civil law; the former being imposed by the conscience, the latter by the power of the state. Hence, they say, ethics regards mental dispositions; jurisprudence, outward acts.[5] From this differentiation they evolve mental

[4] Duties, are actions, or courses of action, considered as being right. Whewell, Elements of Morality, b. i, c. 4.

[5] The character of actions considered with reference to the internal springs of action from which they proceed, is their *moral* character. Whewell, El. Morality, b. iii, c. 1.

conditions which they term *vice* and *virtue,* and distinguish between them and their legal counterparts.[6] Thus, vice is that which morally a man may not do; crime is that which legally he may not do. It will be perceived that in this form of ethical theory the jural notion is paramount, but, as the framers of these theories have not usually been lawyers, or, at best, but what are termed "speculative jurists," a number of misleading ideas have been engendered, or, to employ a more euphemistic expression, ideas that are not in accord with the modern analytical school of jurisprudence.

8. It is said that the first inquiry in moral science is after an ultimate rule, a supreme principle of life, which shall be of imperative and universal authority, and around which shall be grouped all the motives and maxims of action.[7] This seems to be the essential feature of every ethical system, but the variations of method by which this end shall be attained are very numerous.

9. In what are known as the *objective* theories, that is, in the systems which seek the ultimate

[6] It has been said, that *virtues* are the habits of mind by which we are led to perform duties. The transgression of a duty, considered as a habit, is a *vice.* Virtues and vices may also be considered as the results of the dispositions of men. Thus, considered as a disposition, vice is depravity, or *wickedness.* Whewell's El. Morality, b. i, c. 4.

[7] See, Am. Cyc. Art. Moral Philosophy; Sidgwick, Hist. Ethics, 8; Wayland's Moral Science, 33; Whewell's El. Morality, b. iii, c. 1.

moral rule outside of the mind, the jural idea is generally present and the authority of the state as well as of divine revelation is recognized. In these systems the old classification of the schoolmen and their successors seems to be retained, and in a series of three ascending degrees, positive law, natural law, and moral law, is usually embraced the whole science of duty or right conduct.[8]

10. In the *subjective* theories, or those systems which find the ultimate basis of morality within the mind, the prevailing view denies the existence of virtue and vice in the abstract and asserts the existence of a moral sense which approves certain acts and intentions as *right* and disapproves others as *wrong;* in other words, an appeal is made to reason, which is taken as of ultimate and conclusive authority and the source of all moral truth.[9] In this theory, it will be perceived, the jural element is not apparent, yet, as it involves the general doctrine of free will this notion of freedom, it is claimed, serves to connect ethics with jurisprudence. Thus, it is said, the fundamental

[8] This represents the doctrines of S. Thomas Aquinas, and his followers, and is the crowning result of the great constructive efforts of medieval philosophy. Its influence has been great and long enduring, not only in theology but in law as well, and conspicuous examples will be found in the writings both of Blackstone and Kent.

[9] This represents the school of Kant, and certain of the German moralists. It also furnishes the basis upon which many of the college text-books have been prepared. See, Champlin's Principles of Ethics.

aim of jurisprudence is to realize external freedom by removing the hindrances imposed on each one's free action through the interferences of other's wills; ethics, on the other hand, is concerned with the realization of internal freedom by the resolute pursuit of rational ends in opposition to those of natural inclination.[10]

11. It will, of course, be understood that the foregoing is only the barest outline of the two great branches of ethical thought and that both branches are subject to much modification by the various "schools" which have been founded upon them. With respect to the subjective theory we may pass it, for the present, without further comment, but the objective theory raises a few interesting points that can best be considered in this connection.

12. LAW AND MORALS DISTINGUISHED. It is not proposed to enter into a discussion of the principles of jurisprudence, but the loose and indiscriminate manner in which the term "law" is constantly employed, particularly by writers on moral philosophy, would seem to render necessary at least a passing allusion to that term in connection with morals.

13. While we are accustomed to minute classifications of scientific knowledge, it must yet be remembered that these classifications are very modern. There was no such separation of sciences

[10] Sidgwick, Hist. Ethics, 274.

known to the ancients, and the world, with all its varied phenomena, mental and physical, was considered and studied as a whole. In time, lines of demarcation were drawn and what are known as the physical and mathematical sciences came to be separated and formed into distinct classes, but, for many years after this process of differentiation had commenced, such topics as government, politics, legislation, ethics, and other kindred abstractions, continued to be classed together under the general name of philosophy. The word "law" had no definite and specific meaning. It was used to denote the observed relations of phenomena, of every kind and nature, as well as to indicate rules for the regulation of human actions, irrespective of origin or method of enforcement. This indiscriminate and improper employment of the term has continued to our own day,[11] and notwithstanding that it is now employed in the physical sciences merely as a

[11] One of the resultants of this use is the confusion growing out of the application of the term "natural law." It is extensively used by both physicists and moralists, but with quite different meanings. The former employ it to indicate the order of nature; the latter to indicate moral precepts. With the former we are not now concerned, but the moralist's conception is very lucidly expressed by Prof. R. J. Holaind, S. J., in the following definition: "Natural law is a body of moral principles which reason itself teaches, and which are binding on all men." See Natural Law and Legal Practice, 48. Some writers, even legists, have further confounded the term by applying it to that class of animal propensities usually known as instinct.

metaphor, or figure of speech, it is still used by writers on moral philosophy in its early and incorrect sense; that is, to denote either a mode of existence or an order of sequence.[12]

14. We have seen that in the objective theory of ethics the jural idea is the controlling motive. The theory rests on the notion of law, and conduct is regulated and governed by rules. The framers of this theory, however, did not distinguish between law and morals, but only between a higher and a lower law and the higher law was always made to supersede the lower whenever they came in apparent conflict.[13] This view prevailed for many years and finds expression, even in legal treatises, until as late as the middle of the last century. But, in modern jurisprudence the word "law" has now come to have a fixed and definite meaning. The old classification of the schoolmen has been rejected, and, instead of an ascending scale of positive, natural and moral law, we now use the term "law," with no qualifying words whatever, as indicative of a rule of human action, referring only to external acts, and enforcible by a sovereign political authority.[14] All other rules for the guidance of human action are called laws merely by analogy; and any propositions that are not rules

[12] See, Wayland's Moral Science, 25.

[13] Hooker, Eccl. Pol. b. iii, c. 9; Locke, Civ. Govt. 11. Blackstone advances the same view; see Black. Com. Intr. p. 43.

[14] Holland, Jur. 37; Markby, El. Law, 3; Pollock, Jur. 21.

for human action are called laws by metaphor only.[15]

15. There are, however, a large number of what we may call, principles of conduct, or precepts of morality, which obtain a general recognition in every civilized community but which are enforced, if at all, only by public opinion or some other equally indeterminate authority. These principles have been developed through a variety of means. Religion has been a potent factor, probably the most powerful of all,[16] but many other causes have contributed and the principles themselves are constantly being subjected to new adaptations to meet the changing conditions of the people and the exigencies of the times.

16. In many ways these precepts resemble rules of law and not infrequently the two seem to coincide. Thus, the moral precept, "Thou shalt not steal," is, in a general way, the same as the legal rule, but the further moral precept, "Thou shalt not covet," finds no coincident rule in the law. Now, as a matter of fact, the inward covetous desire invariably precedes the outward act of theft, and, from a moral point of view, is far the more reprehensible of the two, and yet, it is not the subject

[15] Holland, Jur. 37.

[16] Many writers contend there can be no morality without religion. For an interesting discussion, see, Mallock's, "Is Life Worth Living;" also, a thoughtful and scholarly monograph by Wm. Poland, S. J., on "True Pedagogics and False Ethics."

of legal rules. The reason for this is, that law does not aim at perfecting the character of men, but has for its object the regulation of the relations which men, as citizens, sustain to each other and to the state. As these relations arise only through words and acts, the province of the law is confined to external manifestations and does not extend to that which lies in the thought and conscience of the individual.[17] All such latter matters fall within the domain of ethics, and, notwithstanding that both law and ethics do, for some purposes, occupy a common ground, and that the rules of the latter, in many instances, relate not only to internal acts of the will but to external manifestations as well, yet, because of their imperfect sanction, they are distinguished from law and classified as morals.

17. MORALS AND ETHICS DISTINGUISHED. While for most purposes, and by most people, morals and ethics are regarded as convertible terms,[18] there would yet seem to be a perceptible difference between them; and, as the first and constant care of the legal student is to distinguish between things which appear similar and yet are different, so it may be well for us to give at least passing attention to these two words.

18. Morality, meaning by that term the rules,

[17] Pollock, Jur. 44.

[18] Thus, Paley says, "Moral philosophy, morality, ethics, casuistry, natural law, all mean the same thing; namely, that science which teaches men their duty and the reasons of it." Paley, Moral Philosophy, b. i, c. 1.

precepts, communal observances and usages which regulate and govern human conduct without any positive sanction, and which furnish, in a general way, a standard of righteous living, finds an expression among all civilized peoples. But, the prevailing morality of a community is a fact, not a theory; neither is it in any way dependent on theories. When or how it became established may not be known, nor is it material that it should be. It is sufficient that it exists. In an age of simple faith and passive obedience no explanation is asked or given as to what duty is, nor why a duty in one case should be different from that in another. General notions are acquired and transmitted, and are observed and followed without question. But in time, as the study of mental phenomena develops, men seek for a rational explanation of these existing facts. Theories are framed and views are advanced, and so the science of ethics comes into being.

19. This may not be in strict accord with the statements of some of the expositors of ethical science, but it certainly is sustained by the history of the subject,[19] and while ethical theory may, and does, have a marked influence on moral practice, the distinction still remains. As has been aptly said by one learned writer,[20] "when man reaches the stage of philosophical questioning, and communes

[19] See, Sidgwick, Hist. Ethics, *passim.*

[20] Pollock's Essays, 293.

with himself concerning morals as of other things in general, he comes to the task with morality ready-made and in full operation. His real object is not to find speculative principles and deduce morality from them as if morality had to be invented for the first time, but to assign principles on which he may account for the morality already familiar to him." It will be seen, therefore, that while we are accustomed to connote the same ideas in morals and ethics, and while to a considerable extent the two words involve the same general notion, yet, they are distinct in this; that morality represents existing facts, while ethics is the scientific hypothesis for the explanation of existing facts.[21]

20. By making this distinction we are relieved of much embarrassment. We are not required to discuss the merits of conflicting ethical theories, nor to choose between them, for the law does not concern itself with theories of morality but with morality itself, as attested by the prevailing public sentiment.

21. THE STANDARD OF MORALS. There are in constant use, as parts of our common speech, the words "right" and "wrong," to which we all attach a more or less definite meaning. When we shall come to analyze this meaning it will almost invariably be found that our conception is ethical, not

[21] The student will find this phase of our subject very ably and learnedly discussed in Pollock's Essays, *passim.*

jural. In other words, that our sense of right and wrong is measured by some internal standard of our own and not by one which the law has established. As a consequence, no one has yet come forward with a definition of these terms, considered as ethical concepts, that is, in all respects, satisfactory. It is said that *wrong* implies a departure from some assumed standard, and *right* a conformity to it, but, while this is undoubtedly true, it sheds no light upon the terms themselves, and we are as much in the dark as ever with respect to their essential character. Like the antithesis of "good" and "bad," they represent diametrically opposed ideas in morals, but this is about all that can, with any degree of certainty, be said concerning them.

22. The internal standard by which we determine right and wrong we call the *conscience,* and, generally, the prevailing views of a community, with respect to morals, are created by the concurring consciences of all or a majority of the people that constitute such community.[22] Now, whatever

[22] As science means knowledge, so conscience etymologically means self-knowledge; and such is its meaning in Latin and French, and of the corresponding word in Greek. But the English word seems to have a more extended signification, implying a moral standard of action in the mind, as well as self-knowledge of our own actions. This distinction was noted by the early Christian moralists, and has since been followed by the commentators, who separate the offices of conscience and assign to each respectively the province of witnesses, accuser, and judge. Under this arrangement he who is condemned by his own conscience is considered as

else may be said concerning it, this something which we call conscience is largely a matter of education, association and environment.[23] This is evident from the fact that morality, or at least the popular conception of moral duties, is different among different peoples at the same time and among the same people at different times. And even where we find a substantial conformity to what we may term the customary morality of a community there will yet be classes, who, by reason of their association and education, seem to have a morality to some extent peculiar to themselves. This is particularly true of the professions, where the abstract principle of right and wrong is applied on specialized lines and it is from this specialization that we obtain what is popularly called "legal ethics."

23. Where the moral convictions of a community generally coincide it produces a force called *public opinion,* which, if sufficiently strong and long continued, eventually crystallizes into a law. When this consensus of moral opinion has developed into a law of the state the words "right" and "wrong," as they may represent ethical concepts, are no

having offended against the supreme rule, and from this is deduced the conclusion, that, he who acts contrary to the dictates of his conscience is always wrong. The fallacy of the conclusion is apparent without demonstration, yet it continues to find large numbers of adherents.

[23] See, Paley, Moral Philosophy, b. i, c. 5; Locke, Human Understanding, b. ii, § 1-12; Whewell, Elements Morality, b. iii, c. 28.

longer applicable. The law is always right, even though it be iniquitous from the moral point of view of the individual. Any other theory inevitably leads to civil disruption and anarchy.

24. OBEDIENCE TO LAW A MORAL DUTY. The question of moral right and wrong has always been a debatable one and will doubtless ever so continue. Not infrequently we find men who assert that specific provisions of the law are morally wrong, and hence not obligatory on conscience, while some even go so far as to say that when conscience condemns a law it should be resisted.[24] This comes, it would seem, from an undue exaltation of self; an apparent belief in an inward divinity whose dictates are unerring and infallible. Now, no person more than the writer reverences this internal mentor we call conscience, but the experience of the ages teaches us that it is a most fallible guide, and history teems with instances of oppression, injustice, and crime, resulting from a narrow and darkened conscience.

25. The moral faculty being thus fallible, it logically follows that in every community there

[24] This pernicious doctrine may even be found in books prepared for the education of American youth. Thus, one writer says: that, where the laws impose duties which the individual conscience pronounces wrong, such person may "openly refuse obedience, be the consequences what they may. Conscience is higher than law; and, in a clear case of conflict between them, the law must yield—at least, conscience cannot." Champlin, Principles of Ethics, 49.

must be, to some extent, a conflict of consciences. Men divide on all the questions of the hour. They have always done so; they will always continue to do so. Both sides are equally honest and sincere, and both are equally insistent. In a rude and barbarous age the appeal, in such a case, was to force, and might became right. But, in time, another arbiter arose. Organized society—the state—came into being, and a new and controlling element was introduced. This element we call *law,* but it is practically nothing more than the embodied conscience of the political community. To this paramount assertion of control and direction each individual of the community is bound to submit. Obedience to law is a moral duty.

26. AUTHORITY OF ETHICAL OPINION. While the proposition of the last paragraph must be accepted, by every lawyer at least, as final and conclusive, there may, perhaps, be room for question where a rule is proposed which lacks the legal sanction. It is often contended, that every man in the possession of unimpaired faculties has a right to be the sole judge of his own course of conduct, and that to compel him to shape such conduct in conformity to the mere opinions of others is virtually to enslave him. The argument is not without force and rests upon a foundation of truth. But in every organized society there is, and always has been, a series of rules, maxims and precepts, which have never been resolved into laws, but which, notwith-

standing, continue to obtain a general recognition and observance. They are the received opinions of the community respecting the matters to which they relate and represent, in many instances, the results of long experience.

27. The acceptance of these maxims is based mainly upon the facts, that the individual cannot have an experience of all things; that his opportunities for observation are necessarily limited; and that a consensus of intelligent opinion upon almost any subject, is usually superior to that of the individual. If every man were permitted to exercise his own uncontrolled judgment with respect to his own conduct, even though he conformed to the letter of the law, most deplorable consequences must often result, while such a course would directly tend to create a spirit of licentiousness that in the end would subvert the good order of society and overturn the law itself.

28. Nor does this proposition involve any legal inconsistency. There are many forms of authority outside of the law and we are constantly recognizing them and submitting to them. We defer to the opinions of our legal advisers, physicians, tradesmen and artisans, in all matters relating to their respective avocations. We do this for the reason, that their experience and observation in the special matter has been greater than that of our own. In like manner we acknowledge the aggregate opinions of community with respect to customary

morals and rules of conduct, and such opinions are, in a proper sense, authority.

29. What is true of society as a whole is also true of many of its component parts, particularly its subsidiary organizations. A craft, or profession, from its experience and observation, establishes certain canons of ethical import and makes rules for the guidance and government of its members. The rules may be express or implied, and it is immaterial whether they be written or unwritten. It is sufficient that they have received a general assent by substantial observance only. They then become binding on all of the members, and derelictions therefrom constitute breaches of the ethical code.

30. LEGAL ETHICS DEFINED AND DISTINGUISHED. Thus far we have been considering only the general subject of ethics, while our special study is denominated "legal ethics." But this is, to a large extent, a misnomer, for our study has nothing to do with law as law, but relates wholly to professional conduct on the part of those who assume to practice law. For this reason, therefore, we shall more nearly express the idea involved if we call it "professional ethics." Yet even this term is unsatisfactory, for it seems to imply that there may be different standards of righteous living and conduct. Indeed, it suggests the very pertinent inquiry: Do men by entering a particular profession thereby assume any moral duties on the one hand or acquire any exemption on the other, distinguishable from

those which apply to the rest of mankind? The answer is an unqualified No! Truth, sincerity, honesty, fidelity and the rest of the virtues, are imposed alike upon the humble artisan and eminent advocate, while the rules which prompt to action are the same in either case.

31. But convenience has invented phrases which custom has sanctioned, until they have become parts of our common speech, and thus have been coined such barbarous terms as "legal ethics," "medical ethics," etc., meaning thereby the moral principles and codes of specialized rules that have been built upon them, which, in theory at least, are to govern the conduct of the practitioner as a practitioner. It will be found upon investigation, however, that while many of these rules are but special applications of broad principles others are strictly conventional usages of the particular profession. This is strikingly illustrated by those rules which relate to the professional intercourse of practitioners, and, while such rules have a decidedly ethical basis, they are yet of that character to which we ordinarily apply the term "etiquette."

32. Legal ethics may also be distinguished from the general subject in that while a violation of the moral code, as established by the conventions of society, will usually result in nothing worse than social ostracism, a disregard of the ethics of the bar may result in professional death. In society men are kept within bounds by no stronger a force than

public opinion, but in the legal profession a summary jurisdiction is lodged in the courts to discipline offenders against morals and good conscience. To this extent legal ethics partakes of the nature of law.

33. But this disciplinary power extends only to the lawyer as a lawyer. It is exercised only with respect to professional duty. As a man and a citizen the lawyer is not distinguishable from other men. His obligations to society are the same as those of every other citizen, and for any breaches thereof, amounting to no more than a disregard of conventional usage, he can be arraigned only at the bar of public opinion.

34. It may be said, and with much truth, that a man called to the honorable position of an advocate should exhibit, both in and out of his profession, the sterling qualities that constitute the highest excellence of righteous living. But this is a duty incumbent on all men, whatever may be their avocation or their position in society. The law does not concern itself with moral duties, however much they may serve to influence legislation, nor does legal ethics properly extend to individual character. It is upon this theory that the present work has been constructed, and in the chapters that follow a consistent effort has been made to confine the subject within its legitimate channel. The writer does not assume to be a mentor nor to teach morals.

35. Scope of professional duty. The ma-

jority of the writers who have heretofore discussed the subject of legal ethics have generally divided their work into a number of succinct heads, under each of which they have treated a specific phase of professional duty. The lawyer is regarded as being charged with a number of distinct professional obligations to society and certain of its members, and the enumeration is usually as follows:

1. To the public—the state.
2. To the suitors—the clients.
3. To the court—judges and juries.
4. To the bar—his professional brethren.

This method of treatment is not without its advantages and serves to sharply define the professional relations which a lawyer sustains. Indeed, every writer, whatever may be the arrangement of his work, must necessarily cover these four formal divisions. In the present work, however, the writer has, to some extent, disregarded the usual conventional disposition of topics and, while covering each of them, has endeavored to secure a greater freedom and range of action by adopting a less arbitrary division. While the discussions which follow all relate, directly or indirectly, to the topics above enumerated, they have been considered separately or in conjunction, as seemed most conducive to clearness of statement and a better understanding of the general subject. No attempt has been made to present them in the order above shown nor to preserve the respective heads.

CHAPTER II.

THE OFFICE OF THE ADVOCATE.

Generally considered—The essential principle of advocacy and the conditions that support it—Origin of advocacy and character of early practitioners—Early concepts of professional duty and their effect on later developments—Division of legal labor and its effect on professional ethics—General duties of the advocate and immemorial obligations—Connection and professional relation of the bench and bar.

36. GENERALLY CONSIDERED. In an earlier age, when society existed only in its primitive forms, the transactions of the people were simple and easily adjusted. If, perchance, differences arose, which resulted in judicial inquiry, the process was summary and the procedure unartificial, as befitted the rude simplicity of the times. The inquiry might take any form that seemed best suited to the exigencies of the particular case and any and all kinds of evidence might be received. But in time, as civilization advanced, as transactions became more complex, and as clearer ideas of rights and duties came to prevail, it was found necessary to establish rules for the presentation of causes and the manner in which they should be conducted. Experience demonstrated that the want of settled methods of procedure produced a confusion and uncertainty which

not infrequently resulted in great injustice, and with the deepening of this conviction came the first regular forms of legal actions. Later, as the rules became more numerous and more nicely distinguished, they became also less easily understood and applied by the great mass of the people, until finally no one who had not given the subject particular attention could safely assume to conduct a litigation. From these conditions was evolved a class of men who, by their learning and skill, have rendered themselves competent to discharge the duties incident to the conduct of cases in the courts, and this class we now call the Legal Profession.

37. With the accumulation of years has come also an increased degree of importance for the members of the legal profession. Originally employed only as a convenience, their services have now become indispensable. No one thinks of applying to the courts save through the medium of the lawyers. "They have become," says one writer, "the organs whereby the complicated wants of mankind reach the ear of Themis,"[25] and, as the relations of society continue to grow more varied and complex, so will the lawyer's profession become correspondingly more essential in the adjustment of any differences that may arise. For many years it has been a recognized division of civil society, exerting a powerful and, in some respects, dominating influence. Its character and honor have therefore

[25] Forsyth, Hortensius the Advocate, 388.

become matters of public concern, and because of the magnitude of the interests placed in the hands of its members, the responsibilities which they assume, and the confidences with which they are intrusted, there is demanded of them in the exercise of their duties an exemplification of the highest qualities of moral excellence. Indeed, as has been declared in one case, the purity and efficiency of judicial administration, which under our system is largely government itself, depend as much upon the character, conduct and demeanor of attorneys as upon the fidelity and learning of courts, or the honesty and intelligence of juries.[26]

38. THE PRACTICE OF ADVOCACY. With the growth and development of the practice of advocacy there has also grown and developed a class of detractors who not only attack the lawyers but assail the principle of advocacy itself, which they are wont to characterize as repugnant to good morals and sound ethical precept. It would seem that this class has always existed, and presumably will continue to exist, so long as advocacy shall continue to be practiced. While we can afford to smile at the malignant spirit which prompts these invectives, as well as pity the narrow-mindedness that can foster such a spirit, we cannot afford to pass the matter without a fair examination of the propositions involved.

39. The essential principle of advocacy consists

[26] Proceedings Ala. Bar Assn.; in 118 Ala. xxiii.

in the substitution of persons professing special skill and learning in litigated matters for the actual litigants, to do, on their behalf and in their stead, all which they, if possessing sufficient knowledge and ability, might do for themselves with fairness to their opponents. This very tersely, but it is believed accurately, describes the full scope of the advocate's calling. To the proper operation of this principle it is a necessary condition that the advocate shall receive such reward for his exertions as may compensate him as well for the preparatory study required as for the actual labor involved. It is a further condition that he should be willing, as a rule, to render his services without previously deciding upon the merits of the cause for which he is retained.[27] These conditions must exist to sustain the principle, yet it is these that furnish to the assailants of the profession the arguments which form the basis of their attacks.

40. In the discussions of the different phases of professional character and duty that follow we shall have occasion to examine these conditions in connection with the principle which they support. It is enough, at this time, to show how utterly impracticable is the idea, that, in a society like ours, every man involved in litigation should conduct his own cause or present it only through the medium of unpaid and unskilled friendship. For the due administration of justice we must have men compe-

[27] U. S. Law Mag. vol. i, p. 3.

tent to advise both the suitor and the court. Such assistance, as a general proposition, cannot be procured without a proper provision for compensation. And even though we admit that the advocate is ready to undertake either side of a cause for hire, it does not thereby follow that he is venal nor that his attitude contravenes the principles of a sound morality.

41. In the larger portion of the vituperative attacks to which the bar is subjected the writers seem to assume that all litigated causes involve a direct opposition of truth and falsehood, and that counsel engage to support the bad side with full knowledge of its iniquity and do violence to their own convictions solely for the sake of pecuniary gain. It is this wholly fallacious assumption that has furnished a favorite theme for declamation, satire and reproach in every age, and the old threadbare argument continues to find expression in the current works of the pseudo-moralists. Now, as a matter of fact, in the great majority of litigated cases, even after a careful hearing of both sides, it is extremely difficult to say on which side the legal right lies. Yet these self-appointed censors continue to upbraid the lawyers because they refuse to usurp the functions of the judge and decide in advance, upon *ex parte* testimony, who has the right of the cause. This is not the office of the advocate. His function is not to make decisions but to provide materials from which others may make decisions.

He does not even furnish all of the materials out of which such decisions are to be framed. He stands in the shoes of his client and presents only his client's side of the case. Neither in law nor morals is the client required to do more, and the advocate is under no greater an obligation than the person he represents.

42. ORIGIN OF ADVOCACY. The attorney and counsellor of the American law courts is a lineal descendant of the ancient English barrister, and, by an unbroken chain of pedigree, may trace his genealogy back to the first rudimentary forms of our present legal procedure. It is impossible, however, to say at what time or in what manner the practice of advocacy was introduced into England, and while some imaginative legal historians have assigned a date as early as Alfred the consensus of critical opinion places it at a much later period.

43. It would seem that under the Saxon kings, and certainly for some time under Norman rule, every litigant spoke for himself, or, in some cases, if laboring under a disability, by his representative. But in the latter case there was no limitation upon the litigant as to whom he should select as his representative, nor was exclusive audience in the courts reserved for any class of the king's subjects. Thus matters continued until about the time of Henry II., when legal procedure commenced to assume its present form, and the latter half of the twelfth century was probably the time when ad-

vocacy may be said to have made its appearance. It was not until the century following, however, that we may perceive the actual existence of a body of men following the law as a profession, in which is involved the notion of advocacy with its attendant rights and duties.

44. The early lawyers, in the main, seem to have been ecclesiastics, but about 1207, priests, and persons in holy orders generally, were forbidden to act as advocates in the secular courts, and from thenceforward we find the profession composed entirely of a specially trained class of laymen. It is said that when the prohibition above mentioned went into effect those of the clergy who had adopted law as a profession, and were unwilling to be deprived of this means of livelihood, assumed a coiffure, or close-fitting head-dress, to hide the clerical tonsure, and this became the distinguishing badge of the legal profession for many years thereafter.[28] To this circumstance is also ascribed that peculiar feature of the modern English barrister—the wig.

45. The first persons regularly licensed to appear as advocates in the king's courts were called "serjeants," although their full official title seems to have been *Servientes Domini Regis ad legum,*

[28] This is the accepted theory but it has been denied by a late writer who contends that the coif was honorably assumed by the early lawyers as a distinctive badge, which, like the cap of the doctor, carried with it the idea of special authority and learning. See, Pulling, Order of the Coif, 24.

that is, "Servants at law of our Lord the King." Unlike all prior advocates, they were a part of the court itself; were regularly appointed by royal patent; were admitted only upon taking an oath; had a monopoly of all the practice, and were directly amenable to the king as parts of his judicial system. The fundamental ideas involved in the creation of this class have never been abandoned, and, notwithstanding that the class itself by the name "serjeants" has ceased to exist, they are still the distinguishing characteristics of the bar in all countries where the English common law prevails.

46. For several generations the serjeants constituted the entire bar, but about the time of Edward II. other persons came to be admitted to practice under the name "Counsellors at law," and, until very recent years, a distinction was made in England between serjeants and counsellors, the former being the ranking class. At present the order of serjeants[29] is extinct.

47. The writer has dwelt at length on this genesis of the legal profession for the reason that much of the customary observance, rules of conduct, and professional morality which at present obtain, arose from and grew out of the character of these early practitioners and the relations they sustained.

48. EARLY CONCEPTS OF PROFESSIONAL DUTY. As stated in the foregoing paragraph, the first ad-

[29] Frequently called the "order of the coif," in allusion to the head-dress.

vocates admitted to practice in the courts were called "Servants at law of our Lord the King," a title, observes one writer,[30] that "has stereotyped the functions of an English barrister at all times." That is, the bar is an integral part of the judicial system, an assistant in the administration of justice, and as such it occupies a peculiar and unique position with reference both to the bench and the public. The oath of the ancient advocate bound him to serve both the king and "his people," thus prescribing, as it were, a divided allegiance, and this character, impressed upon the profession at its very inception, has never been changed.

49. The serjeant, being thus doubly bound, was required to act with absolute good faith towards both the judges and the clients, owing no more duty to one than to the other. As representing the king he was bound to avoid all deceit upon the court and to act uprightly in the conduct of his business; as representing the people he was bound to give honest advice and his best aid to the suitor. Time has changed the complexion of the bar in many respects, but these fundamental ideas of professional duty remain unaltered.

50. Division of legal labor. In the United States a licentiate in law is admitted to practice as an "attorney and counsellor," a combination of names and functions unknown to the English law. We have seen that the English barrister was made a

[30] Inderwick, The King's Peace, 93

part of the court. His office was as distinct and well defined as that of the judge, who, in the common law courts, was always taken from the ranks of the bar. He became an actual sworn assistant in the administration of justice. It was his duty to advise the court upon the law of the case and to advise and assist the suitor in presenting his evidence, and to both he was required to act with the utmost fairness and good faith.

51. But to enable him to properly fulfill the duties involved in his divided allegiance to "the king and his people," and to preserve an independence of judgment and action which, it was contended, could not be guaranteed if by any means the counsel should be pecuniarily interested in the result of the litigation,[31] there grew up a custom of intervention between the advocate and the client by a class known as "attorneys and solicitors." The attorney meets the client, enters his appearance upon the record, prepares and files the pleadings, and generally manages the case in all of its details, except the trial. At the trial the counsellor, or barrister, assumes charge, receiving his instructions from the attorney.

52. This distinction of practitioners and division of labor has never prevailed to any appreciable extent in the United States. It is a medieval Eng-

[31] In theory the English barrister makes no charge for his services, his emoluments being in the nature of an honorarium.

lish exotic which did not seem to thrive in our soil, and, while traces of the practice are observable during the earlier years of the Republic, particularly in the federal courts, the dual character soon came to be assumed by the same person. As the conventional rules governing the two classes were in many respects dissimilar, the result of this union of duties has been to produce a code of ethics differing in some particulars from that which obtains at the English bar.

53. GENERAL DUTIES OF THE ADVOCATE. No very specific enumeration of the duties of the advocate has ever been made by statute, either in England or America. In some instances courts have spoken and announced a rule of conduct for the particular case, but, in the main, the ethical code of the profession is unwritten. On several occasions sporadic attempts have been made to introduce something of this kind into the codes of civil procedure,[32] apparently under the mistaken idea that a moral principle is suspectible of the same method of treatment as the axioms of mathematics. The basis for most of these attempts is the ancient oath administered to advocates by the laws of Geneva,[33] and the prescriptions of professional duties

[32] See, Report, Com. Code Civ. Pro. N. Y. § 511; Code, Ala. § 791.

[33] The oath referred to is as follows:

"I swear before God,

To be faithful to the Republic and the canton of Geneva;

have usually been but feeble paraphrases of that instrument.

54. Fortunately, for the bar and for the public, there are no rules of morality for the lawyers which do not apply with equal force to the laity, and it is well that there should not be. The lawyer is pretty much what the laity makes him. The character of the bar is but a reflex of the character of the community. As has been well said, "An unscrupulous bar could not exist in a high-minded community; and if anywhere a corrupt legal profession is to be found it is found in the midst of a corrupt and corrupting people."[34] This is the lesson of history and the experience of all the ages.[35]

Never to depart from the respect due to the tribunals and authorities;

Never to counsel or maintain a cause, which does not appear to be just or equitable, unless it be the defense of an accused person;

Never to employ knowingly, for the purpose of maintaining the causes confided to me, any means contrary to truth, and never to seek to mislead the judges by any artifice or false statement of fact or law;

To abstain from all offensive personality, and to advance no fact contrary to the honor or reputation of the parties, if it be not indispensable to the cause with which I may be charged;

Not to encourage either the commencement or the continuance of a suit from any motive of passion or interest;

Not to reject, for any considerations personal to myself, the cause of the weak, the stranger, or the oppressed."

[34] Commrs. Report, N. Y. Code Civ. Pro. § 511.

[35] This phase of our subject finds an apt illustration in the conditions which prevailed at Rome during the declining

55. Neither is it possible to prescribe rules which shall determine an attorney's duty or dictate his action in the varying phases of each particular case, and about all that can be said is that he should be guided in a general way by recognized usages, the prevailing moral sentiment, and the suggestions of his own conscience.[36] And by the latter

years of the empire and which Gibbon has so graphically described in the following words:

"In the decline of Roman jurisprudence, the ordinary promotion of lawyers was pregnant with mischief and disgrace. The noble art which had once been preserved as the sacred inheritance of the patricians was fallen into the hands of freedmen and plebeians, who, with cunning rather than with skill, exercised a sordid and pernicious trade. Some of them procured admittance into families for the purpose of fomenting differences, of encouraging suits and of preparing a harvest of gain for themselves or their brethren. Others, recluse in their chambers, maintained the dignity of legal professors by furnishing a rich client with subtleties to confound the plainest truths, and with arguments to color the most unjustifiable pretensions. The splendid and popular class was composed of the advocates, who filled the Forum with the sound of their turgid and loquacious rhetoric. Careless of fame and justice, they are described, for the most part, as ignorant and rapacious guides, who conducted their clients through a maze of expense, of delay, and of disappointment, from whence, after a tedious series of years they were at length dismissed, with their patience and fortune almost exhausted."

[36] In a few states bar associations have made prescriptions of moral duties for the guidance of their members, but these attempts to codify principles do not seem to be very successful. Indeed, "moral duty" is no more susceptible of definition than "fraud" or any of the other terms which the law has refused to define.

is not meant the promptings of wayward impulse but the educated, judicial conscience, that carefully distinguishes the relative positions of rights and duties in all their bearings.

56. The whole duty of the lawyer is tersely summarized in the oath of office now generally administered in all of the states as well as in the federal courts. This, in general terms, requires him to uphold the law; to demean himself, as an officer of the court, uprightly; to be faithful to his trust. No more could be required; no less should be demanded. To attempt to define the infinite variety of aspects and phases that are involved in the foregoing simple enumeration would be an impossible task. Nor is such a definition necessary.

57. In the pages that follow I have endeavored to discuss, in a necessarily brief and desultory manner, a few of the salient features of our subject, and have selected those topics which seem of most importance to the young and inexperienced attorney. Some of the propositions will receive a ready confirmation by his own moral sense of right and wrong. Some may appear a trifle finical, particularly those which relate to professional etiquette, but it must be remembered that they represent the old and long-established customs of the most respectable and conservative of all the learned professions. The generation that is laying down the burdens of professional life expects from those who are coming in to take them up, a careful adherence to the old

customs and established usages. They were given to us by the fathers aforetime, to be guarded with jealous care and transmitted to our successors in the same form in which they were received. They are a part of the glorious inheritance of the American bar; the characteristics which serve to distinguish us; the badges of our respectability. Let no modern spirit of innovation disturb these ancient landmarks.

58. Relations of the Bench and Bar. We have seen that when advocacy finally became an exclusive calling and the advocates a distinct class with special privileges, it was provided, among other things, that the judges of the king's courts should always be selected from their ranks. The education and associations of the judges and lawyers were therefore the same, and they invariably addressed each other as "brother," both in public and private.[37] This intimate relationship has been generally continued, and, as a rule, the bench is still recruited from the legal profession. This is strictly true of the federal courts and generally so of the state courts, although in the latter we occasionally meet with the anomaly of a man presiding over a court in which he has never been admitted to practice.

59. But, happily, the condition just noted is becoming every day more rare, and the general proposition holds good that judges must first be lawyers. The very fact, then, that one of the great coordinate departments of government is administered

[37] Inderwick, King's Peace, 94.

by men selected only from one profession gives to that profession a certain pre-eminence which calls for a high standard of morals as well as intellectual attainment. The integrity of the judiciary is the safeguard of the nation, but the character of the judges is practically but the character of the lawyers. Like begets like. A degraded bar will inevitably produce a degraded bench, and just as certainly may we expect to find the highest excellence in a judiciary drawn from the ranks of an enlightened, learned, and moral bar.

60. Not only are the judges, the interpreters of the laws, drawn from the ranks of the lawyers, but that profession, more than all others, contributes to fill the halls of legislation and supply the chairs of administrative offices of high position and responsibility.[38] Learning, honor, and integrity are alike necessary in those who are called to discharge these great trusts; the future stability of the country rests, in very large measure, on those who make and execute the laws, and our guarantees for the peaceful enjoyment of life, liberty and property must be sought in their character and moral qualities.

[38] It is said that "twenty-five out of fifty-six signers of the Declaration of Independence, 50 out of 55 members of the convention which framed our Federal Constitution, 19 out of 24 Presidents, 17 out of 23 Vice-Presidents of the United States, and 219 out of 234 Cabinet officers, were lawyers; that more than two-thirds of the United States Senators, and about one-half our Representatives in Congress, and Governors of the several states, and the majority of our diplomats and representatives in foreign countries have been lawyers."

CHAPTER III.

THE ADVOCATE AND THE COURTS.

Generally considered—The summary jurisdiction of courts—Methods of summary discipline—Nature of disciplinary power—Effect of discipline on the legal rights of the citizen—Grounds for discipline—Discipline for unofficial misconduct—Misconduct without discipline.

61. GENERALLY CONSIDERED. The legal profession occupies, in many respects, an unique position among the callings and occupations of men. While its general features bear some similitude to the other learned professions it differs from them in many important particulars. The lawyer, like the physician, serves the public; the one as an assistant in the protection and preservation of rights, the other in the protection and preservation of health; but here the parallel ends. The lawyer not only serves the public—that is, the individuals who compose the body politic—but he also serves the body politic itself—the state, and for this purpose necessarily occupies a dual relation, which distinguishes his profession from all others. He not only practices in the courts but is himself an integral part of the judicial machinery, and as such is subject to a disciplinary power from which the members of other professions are exempt. He enjoys certain

exclusive privileges and is under certain special obligations and subject to certain responsibilities. For an abuse of his privileges, as well as for derelictions of professional duty, he may be compelled to account, not only at the bar of public opinion but also of the court that admitted him to practice. In addition to the punishments inflicted by society he must also bear the marks of sovereign displeasure, and, in this respect, the code of professional ethics resembles a code of law.

62. SUMMARY JURISDICTION OF COURTS. The summary jurisdiction which a court is permitted to exercise over attorneys and counsellors, while to some extent conferred by statute, seems to originate in the inherent disciplinary power which the court possesses over its attorneys as officers of the court. It is, in fact, but a continuation of the old ideas that were involved in the original appointment of the serjeants, and has always formed a part of the judicial scheme of every country where the common law prevails. The attorney of the United States, no less than the barrister of England, still represents the sovereign as well as the people. He is a part of the judicial machinery; an assistant in the administration of justice; and the theory is that as such officer of the court he is responsible to it for professional misconduct.[39]

[39] Ex parte Garland, 4 Wall (U. S.) 333; Ex parte Wall, 107 (U. S.) 265; Ex parte Biggs, 64 N. C. 202; Whitcomb's case, 120 Mass. 118.

63. The opinion at one time seems to have been, that the jurisdiction extended only to attorneys employed as such in suits depending in court, and that it could be exercised only to hold them to their duty in such suits. But a broader view is now taken, and it would appear to be well settled that such jurisdiction applies to any matter in which an attorney has been employed by reason of his professional character,[40] and extends to all cases of professional misconduct, whether in or out of court.[41]

64. The exercise of this summary jurisdiction rests in the sound discretion of the court, but must be employed with caution and moderation.[42] The power is not an arbitrary or despotic one, to be exercised at the mere pleasure of the presiding judge, or from motives of passion, prejudice or personal hostility, for it is quite as necessary for the proper administration of justice that the rights and independence of the bar should be guarded and maintained as the rights and dignity of the court itself.[43]

65. METHODS OF SUMMARY DISCIPLINE. For any flagrant dereliction or disregard of professional duty on the part of the attorney the license by which he was admitted to practice may be revoked. This is known as *disbarment,* and the effect of a disbar-

[40] Anderson v. Bosworth, 15 R. I. 443; Ex parte Staats, 4 Cow. (N. Y.) 76.

[41] People v. Green, 7 Colo. 237.

[42] State v. Kirke, 12 Fla. 287; Ex parte Burr, 9 Wheat. (U. S.) 529.

[43] Ex parte Sercombe, 19 How. (U. S.) 9.

ment is the utter extinction of professional character. It is only for grave offenses, however, that this method of discipline is resorted to. Sometimes there is inflicted a qualified disbarment, as that the attorney may not practice in the courts for a specified period. This is known as *suspension,* and its effect, while it lasts, is the same as disbarment.

66. By far the more common methods of discipline are *reprimands* and *fines,* the latter ofttimes entailing a deprivation of personal liberty until paid or discharged.

67. For violations of professional etiquette or breaches of decorum, particularly if committed in the presence of the court, the offending attorney may be punished by reprimand, fine or imprisonment. Where the offense amounts to what is technically known as *contempt* of court the offender is usually fined, and may be committed until the fine is paid. Where the contempt is of a flagrant character imprisonment is frequently inflicted. These punishments are resorted to for the purpose of vindicating the outraged dignity of the court, for unless the solemn and dignified character of the court is maintained the administration of law and the forms of justice would soon sink into a meaningless travesty.

68. But the lawyer is not alone a gentleman; he is a sworn minister of justice. His office imposes high moral duties and grave responsibilities, and he is held to a strict fulfillment of all that these

matters imply. Interests of vast magnitude are intrusted to him; confidence is reposed in him; life, liberty and property are committed to his care. He must be equal to the responsibilities which they create, and if he betrays his trust, neglects his duties, practices deceit, or panders to vice, then the most severe penalty should be inflicted and his name stricken from the roll.

69. NATURE OF DISCIPLINARY POWER. It would seem from the character and consequences of reprimands, fines and temporary suspensions, that they should be regarded as punishments inflicted for violations of professional duty, and the same idea has been extended to disbarment. The better considered opinions, however, distinguish between the first mentioned matters and disbarment, holding that the power to revoke the right to practice rests on different grounds from the right to punish.[44] Indeed, the element of punishment, although undoubtedly present, does not seem to be contemplated in disbarment proceedings, and the measure is regarded only as an act of protection. That is, that a person who, by practices in derogation of his official oath and by conduct unbecoming an officer of the court, has rendered himself unworthy of his office and whose retention therein will operate to the manifest detriment of the profession, should be re-

[44] Ex parte Robinson, 19 Wall (U. S.) 505; Jackson v. State, 21 Tex. 668.

moved, not as a punishment of the offender but as a protection to the court, the bar and the public.[45]

70. DISCIPLINE DOES NOT AFFECT LEGAL RIGHTS. It will be perceived from the foregoing that the summary power exercised by courts in the punishment or exclusion of offending attorneys rests almost wholly on ethical grounds and applies only to professional misconduct. If the matter in question is entirely unconnected with the attorney's professional character, or if the misconduct charged relates to something outside of the line of professional duty, then, as a rule, the court will have no right to interfere,[46] and, generally, charges that affect the attorney's character only as a man or his integrity as a citizen, will furnish no grounds for disciplinary proceedings.[47]

71. Thus, it may often happen that a client feels aggrieved at the action of his counsel in the withholding of funds that have been received in the course of his professional employment. In this event he may apply to the court to discipline the attorney, and, in a proper case, the court may interfere in a summary manner to compel the performance of a professional duty, for the liability of an attorney to summary process for the payment of

[45] Ex parte Wall, 107 U. S. 265; State v. Winton, 11 Oreg. 456; Ex parte Biggs, 64 N. C. 202.

[46] Matter of Huson, 62 How. Pr. (N. Y.) 358; People v. Appleton, 105 Ill. 474.

[47] People v. Allison, 68 Ill. 151.

money in his hands belonging to his client has frequently been recognized.[48] But a proceeding of this kind will not be entertained when the case simply presents a difference of opinion as to the amount to be charged and retained for services, for courts cannot thus undertake to adjust accounts between attorney and client.[49] A jury is the proper tribunal to ascertain and determine what is fairly due to parties under their contracts, and, unless the charge involves a palpable breach of duty and raises a presumption of bad faith, a court will not interfere.

72. But, as has been shown, an attorney is an officer of the court, and the court which admits him to the privilege of practicing at its bar may, and should, require of him the fulfillment of the obligations that attend the privilege. And, in the furtherance of this right, the court may inquire into transactions between attorney and client and compel such conduct as the circumstances of the case may seem to demand. Nor is such summary process in contravention of the right of trial by jury, for when a court undertakes to enforce the plain duty of its officer it is doing that which a jury cannot do.

73. GROUNDS FOR DISCIPLINE. Upon his admission to the bar an attorney makes a solemn promise that he will demean himself, as an attorney and counsellor of the court, uprightly and accord-

[48] Orr v. Tanner, 12 R. I. 94.
[49] Burns v. Allen, 15 R. I. 32.

ing to law, and that he will faithfully perform the duties of his office. This promise he seals with an oath. In return for the privileges which his admission confers he is held to a strict fulfillment of his promise, and its violation calls for the exercise of the court's disciplinary powers. He is bound to observe all of the rules of practice, as well as such as relate only to the decorum of the court, whether written or unwritten. Nor is his obligation discharged by merely observing the conventional rules of courteous demeanor in open court; he must abstain, out of court, from the indulgence of any practice likely to bring discredit upon himself as a practitioner or reflect unfavorably upon the court. If his conduct is such as to show that he is unfitted to practice he may be suspended or disbarred, and it is immaterial for this purpose that such acts neither constitute a criminal offense nor create a civil liability.[50] It is enough that they indicate such an absence of moral character as to render him unworthy of public confidence.[51] The different phases of the subject will be discussed in the succeeding chapters.

74. DISCIPLINE FOR UNOFFICIAL MISCONDUCT. As a general rule a court will not assume jurisdiction to summarily discipline one of its officers for

[50] Ex parte Cole, 1 McCrary (C. Ct.) 405; Bradley v. Fisher, 13 Wall (U. S.) 335; People v. Barker, 56 Ill. 299; Beene v. State, 22 Ark. 157.

[51] Re Boone, 83 Fed. Rep. 944.

misconduct alleged to have been committed in his private character. In such cases relief can be obtained only by a suit regularly instituted in the proper tribunal at the instance of the party who claims to have been injured.[52] So, too, it would seem that where acts charged against an attorney were not done in his official character, notwithstanding they may be of an indictable nature, if they are not confessed, there should be a regular conviction before a court will strike his name from the roll.[53]

75. But, while the foregoing statements may be taken as expressive of the general rule, and while the rule will, in most cases that come within it, be applied, yet it is not without exceptions. There may be cases where an attorney's misconduct in his private capacity merely is of so gross a character as to warrant summary judicial intervention.[54] It is an essential condition to admission to practice that the applicant shall be a man of good moral character. It is not enough that he shall be learned in the law and competent to conduct litigation. He must, in addition, furnish proof that he is fit to be entrusted with the confidences which his office invites, and failing in this a court may deny him ad-

[52] People v. Allison, 68 Ill. 151.

[53] On this point the authorities are not agreed, but the text states the general and better considered rule.

[54] People v. Appleton, 105 Ill. 474.

mission.[55] The primary object of this is to maintain a high standard of moral excellence in the profession and conserve the ancient dignity and respectability of the bar. This being true, it necessarily follows that this essential character should be maintained after admission, and when the conduct of the licentiate clearly shows, either that the court was deceived at the time of his admission, or that there has been a moral degeneracy since that time, a proper case for discipline may be presented.

76. We have seen that legal ethics has to do only with professional character and with misconduct in a professional capacity. This is true. But a lawyer is yet a man. We cannot wholly separate the professional abstraction from the concrete human personality, and while courts in some instances have assumed so to do, yet the result has usually been detrimental to the fair fame and high standing of the profession. It is further true, that where a moral delinquency amounts to a violation of legal duty it should form the subject of judicial investigation in the regular courses that the law provides. Indeed, to do otherwise is to deny justice and deprive the citizen of his civil rights. But, where the fact has been established, where it has been clearly demonstrated that a practitioner is a dishonest man, whether he was acting professionally or otherwise should be an immaterial question. If he has become

[55] Mill's case, 1 Mich. 392; Secomb's case, 19 How. (U. S.) 9; Randall's case, 11 Allen (Mass.) 472.

an unworthy member of society he is unfit to represent the noble profession of the law. He has violated the fundamental condition of his entrance and forfeited his right to professional recognition; hence, he should no longer be permitted to practice in the courts. This principle is fully recognized, and courts frequently strike the names of such persons from the roll, notwithstanding the particular offense was not committed in a professional capacity.

77. MISCONDUCT WITHOUT DISCIPLINE. Not every infraction of ethical precept, however, will warrant the summary intervention of a court or the exercise of disciplinary powers, and in many things the offender incurs the liability of no greater punishment than may be inflicted by the force of public opinion. Thus the bar has a rigid form of etiquette with respect to many transactions. A violation of this form is attended only by a loss of professional standing. At first blush this punishment does not seem very severe, and, because its effect is not always immediately apparent, many men are induced to persist in practices that contravene accepted standards of good manners. But, in the end, there is scarcely any form of punishment that can compare with it.

78. There is not a man living, who, in his inmost soul, does not desire to be well thought of by his associates, however much he may affect an indifferent exterior. As time flows on this desire

deepens and intensifies, and, all too late, he finds that his professional reputation has become established and that he is regarded as a trickster, a sharper, a person to be avoided, or, if met, to be watched and distrusted. And when this reputation has once become established it fastens itself to the individual with a tenacity that frequently cannot be broken, even by a subsequent life of exemplary conduct. Indeed, so firmly does this reputation become fixed that, in many instances, it survives the individual and remains to taint his memory long after he is dead.

79. Let no one imagine, then, that because his unprofessional practices are of such a nature as to escape judicial scrutiny they may be followed with impunity. The good opinion of his professional brethren can only be created and retained by a strict observance of those matters which long experience and common consent have sanctioned, and without their good opinion eminence at the bar is impossible, irrespective of whatever attainments he may possess in the way of learning and technical skill.

CHAPTER IV.

PROMOTION AND PUBLICITY.

Generally considered—How may the lawyer reach the public—Personal solicitation—Advertising, when and how—Professional cards, and how they may be used—Newspaper advertising—Anonymous announcements—Divorces—Bad debts—Letters and circulars—Self praise.

80. GENERALLY CONSIDERED. To the young attorney, who has just been admitted to practice, the all-important question is: "What shall I do to obtain business?" The merchant, the manufacturer, the artisan, or even the common laborer, finds but little difficulty in solving the general phases of the problem. It is the experience of most persons that, in this life, we generally have to ask for what we get. As a rule, but little comes to us unsought. A man has something to sell, or barter, or which he desires to exchange. To effect his desires he must either go to the persons with whom he would like to trade or, by some means, he must induce them to come to him. There is no escape from this conclusion, and the absolute soundness of the proposition is recognized in every occupation and calling except the professions.

81. It has often been urged in criticism of the legal profession that the lawyer is a creature of pre-

cedents. To a limited extent this is true. Now, in the early days of advocacy, it was held to be incompatible with professional dignity for a lawyer to tender his services or offer to conduct a case in court. His province lay entirely in personal learning and skill, and the stern ethics of that day did not permit him to apply to others to make a trial of his intellectual powers. He must be sought. Of course, there were many whose merits were either never discovered or not appreciated, and, as a consequence, "briefless barristers" abounded in profusion in and about Westminster Hall. The barrister might go hungry, but his dignity must still be maintained, and this early notion of dignity has remained in various modified forms until the present day.

82. It would seem to be a present rule in England that a counselor shall not in any way, nor under any pretence, ask for practice, and notwithstanding that he plies his calling for hire he may not solicit custom.[56] This anomalous condition seems to be founded on much the same principle as that which forbids him to claim his fee as a debt, and, in theory, treats that as a mere honorary gratuity which constitutes in fact his means of livelihood. But this rigorous rule has long ceased to obtain more than a nominal observance in England, and never seems to have secured a practical recognition in the United States.

[56] Forsyth, Hortensius the Advocate, 350. This seems also to be one of the cardinal rules of the French bar; see Jones, History of the French Bar, 198.

83. One reason for the non-adoption of the rule in this country grows out of the union of the two branches of the legal profession—attorneys and counselors. While the counselor was not permitted to solicit no such inhibition seems to have been placed upon the attorney. But the attorney, for many years, was rather looked down upon by his brother at the bar. Indeed, he was not regarded as a lawyer, or, at best, but as a partial lawyer occupying a mean and inferior position. Time has remedied this matter in England, while in the United States the term "attorney" has come to have a generic significance that embraces all branches of legal practice.

84. But this old notion of professional dignity has never been wholly eradicated, so far, at least, as respects the solicitation of clients. In a general way it may still be said that solicitation is unprofessional, and notwithstanding that the practitioner is an attorney he is also a counselor, with all the traditions of his legal ancestry. He may indeed announce his professional character, but only in a modest and decorous way. He may, in a proper manner and upon proper occasions, speak of his profession and even of his own connection therewith, but cannot, without violating the canons of good taste, as well as the ethics of the bar, offer his services for sale nor vaunt his own abilities. The profession of law remains today what it always has been, a high and

honorable calling, and no one invested with the prestige which it confers should be permitted to degrade it to the level of a mercenary trade. The huckster, or even the "hustler," has mistaken his avocation when he selects advocacy. His talents will show to much better advantage in some other line where his commercial instincts will not be shackled by ancient conventionalities.

85. But however much we may theorize we cannot escape the conclusions announced at the opening of this section. The lawyer has no immunity from the common lot of mankind. He must live; and, if he is to live by his profession, he must have clients. These propositions are self-evident, and there is no way of evading their irrefutable logic. The question, then, would seem to be: "To what extent may a lawyer solicit custom and what methods may he properly employ?"

86. PERSONAL SOLICITATION. As stated in the preceding paragraph, it was formerly a rule of general and uniform observance, in all countries where advocacy was practiced as an exclusive calling, that it was beneath the dignity of an advocate to solicit business, and this rule seems to have been of such imperative obligation that to violate it in any respect was to lose standing at the bar. In England it was applied with practically no exception, but on the continent, where the right to demand and receive fees was recognized, it was qualified by the

proviso that in case of a defense an advocate might offer his services gratuitously to the poor.[57]

87. If we are to regard the profession of law as a legitimate means of livelihood and not as a mere honorary occupation, then it should be governed, in the main, by the same rules and subjected to the same tests that are applied to other honorable callings, and, if this be true, there can be no well-grounded reasons for denying to the lawyer the same opportunities for acquiring practice as are afforded to men in other walks of life. Nor is there any impropriety in a respectful solicitation of business from friends and acquaintances, or even from the general public. The manner in which this shall be accomplished is practically the only question to be considered. Indeed, in many cases, the young attorney must resort to his acquaintances and rely, to some extent, on their good offices in his behalf. So long as this solicitation is made in a modest and decorous manner it is difficult to perceive wherein any injury can result to either the solicitor or the profession. On the other hand, a persistent and offensive assertion of self will usually create an aversion in the minds of those sought to be affected.

88. This phase of our subject has produced a large amount of sentimental gush and high-flown rhetoric, and students, from time immemorial, have been admonished that law should be pursued for its own sake and not for gain; that the philanthropic idea should alone actuate the advocate and stimulate

[57] Jones, Hist. French Bar, 198.

his endeavors, and that the time-honored rules of the bar must not be infringed. In a way all of this is true, yet the fact remains that law *is* pursued as a lucrative calling, and much of the real good which the advocate is enabled to accomplish for his client results from this fact. It is a further fact that the ethical idea involved in solicitation is not so much a regard for ancient conventional rules as a proper deference to present public opinion concerning the dignity of the legal profession. When a solicitation can be made without a loss of professional dignity or a lowering of professional standing, then it is proper; when it cannot, then there should be no solicitation. This is about all that can be said upon the subject with any degree of certainty, and the circumstances of the particular case must determine the conduct of the attorney.

89. In the foregoing paragraph the subject of solicitation has been considered from the point of view of the respectable practitioner who hesitates between self-interest and professional decorum; who seeks practice but is yet observant of the proprieties. There are, however, some very objectionable features of solicitation to be seen in the cities, where a horde of so-called lawyers find a regular and profitable employment in following accidents and soliciting retainers from the injured. This is solicitation in its most degrading form, and a vile prostitution of the advocate's calling. Yet the "ambulance chaser" has become a recognized feature of

city life. He haunts the hospitals and visits the homes of the afflicted, officiously intruding his presence and persistently offering his services on the basis of a contingent fee. This is not law practice; it is simply a form of legalized piracy. No man can adopt such a course and yet retain the respect of his professional brethren, for while the person so doing violates no rule of law he is guilty of a gross infraction of one of the best-known and longest-established ethical precepts of the bar. Unfortunately, this is a practice that cannot be stopped by legal methods. The recourse is to the moral sense of the bar; if this sense is weak no relief may be expected, and, so long as complacent juries shall freely give away other people's money and this class of practitioners continues to receive the favorable consideration of bench and bar, so long will the practice itself continue.

90. ADVERTISING. In a small community, where the local attorneys are known to all or the larger portion of the people and their respective abilities are matters of common notoriety, there exists no necessity for an attorney to advertise his business through any other than the legitimate medium of ordinary practice. But in large cities and centers of population, where both business and social acquaintance is limited, it seems almost a matter of absolute necessity for the young advocate to reach the public through some of the methods that may properly be denominated "advertising."

91. Now it is well settled that every man has a right to choose his own occupation in life, subject only to the restraint necessary to secure the common welfare. This is one of the privileges of citizenship.[58] He not only has a right to choose his occupation, but the further right to pursue and carry on the business of such occupation in any way and by any methods that are lawful and proper. As has been well said, in these days of commercial enterprise, advertising is an important factor in business pursuits, and therefore every man has a right to advertise his business in any legitimate manner so as to attract the attention of the public.[59]

92 But the ethics of the legal profession forbid that an attorney should advertise his talents or his skill as a shopkeeper advertises his wares,[60] and public policy is distinctly opposed to any efforts that may tend to invite or encourage litigation. To what extent, then, may an attorney present himself for public consideration, and how far may he proceed without infracting any of the rules which the force of long and well-settled public opinion has established for the regulation of this branch of professional conduct? The solution of this question is far from easy. Modern methods of transacting business have materially changed the ancient formu-

[58] Forer v. People, 141 Ill. 171; Commonwealth v. Perry, 155 Mass. 117; People v. Gillson, 109 N. Y. 389.

[59] Ruhstrat v. People, 185 Ill. 133.

[60] People v. MacCabe, 18 Col. 186.

las of the commercial world, and these changes have not been without effect in legal circles. Much as we may deplore the fact it would yet seem that the leaven of commercial influence is actively at work in the legal profession, and the result has been to create wide departures from former standards, even in the matter of advertising.

93. CARDS. From time immemorial, as we reckon time from the professional standpoint, the only method of announcement sanctioned by our unwritten code of ethics is the modest "card," and this, if we shall consult only the best usage, should bear upon it nothing more than the name, occupation and business address of the individual or firm by whom it is issued, displayed in inconspicuous characters. This slender bit of pasteboard has long been considered fully adequate for all professional needs, and for many years no other or different medium has been deemed necessary to enable the attorney to reach the public. If perchance the practitioner has felt the necessity of a wider dissemination of his name and occupation than was afforded by his own efforts, he has been permitted to reproduce his card in the advertising columns of magazines and newspapers of high standing. But this was the limit of the advertising methods permitted by the "old school," and, in the opinion of the majority of the legal practitioners of today, to transcend this limit is to violate a fundamental rule of the code.

94. It certainly must be admitted, that a plain and modestly lettered card carries with it a certain dignity that is wholly lost whenever an ostentatious display is attempted, and as the object of all advertising is to interest the public in the advertiser or his wares, then, as a matter of good business policy, that method should be pursued which is most likely to attain such end. The legal advertiser does not offer a marketable commodity, the merits of which he may with propriety vaunt. He offers himself—his talent and his skill. It ill becomes him, then, to sound his own praise, even though it be done indirectly by a recital of the things he is able to accomplish.

95. It is enough, therefore, simply to announce the fact of professional character and the place where clients may attend. This latter should always be the attorney's office. There are certain classes of practitioners who also state their place of residence, and, impliedly at least, invite clients to consult them there. As a general proposition, however, these classes do not represent the better elements of the profession, and while an attorney may receive his clients at his home the prevailing sentiment of the bar is distinctly opposed to such a practice. For this reason the placing of a residence address on a professional card is always regarded as bad form.

96. Attorneys pursuing a special branch of the law may also announce their specialty, yet such announcement should be made in the same dignified

manner. Probably the widest departures from good taste occur in this form of advertising. In these modern days of commercial activity too many attorneys become impressed with the idea that to succeed at the bar the practitioner must be a "hustler," and it is through the precept and example of this class that law is so frequently degraded from its true character as a learned and liberal profession and made to assume the features of a mean, sordid, and grasping trade.

97. NEWSPAPER ADVERTISING. As stated in the last section, an attorney may, without violating any of the proprieties, insert his card in periodical publications of standing and repute. The village newspaper is a conspicuous illustration of the manner in which this can be done with no diminution of professional dignity. Law journals, and periodicals devoted to legal and financial interests, are now regarded as proper media whereby to reach the public. High-class literary magazines occasionally insert a column of professional cards, and this form of advertisement is probably unobjectionable at the present time. But this practically completes the list. The trade journal, the flashy or sensational weekly, the nondescript purveyor of cheap fiction, and the ephemeral advertising sheet, are all to be avoided. No self-respecting lawyer will ever permit himself to be represented in the columns of this class of journals, and no one can be so represented without losing caste as a practitioner.

98. The daily newspaper of the cities is equally objectionable. The character of the paper itself is immaterial; it is the fact of advertising and the company in which the advertiser is found that is condemned. What shall we think, what can we think, of the attorney who plaintively appeals for public recognition with a medical quack on one side and a humbug clairvoyant on the other? Of the three, the seventh son of a seventh son most commands our respect, for he, at least, impliedly admits that he is a fraud, while the others attempt to screen themselves under the mantles of the learned professions.

99. ANONYMOUS ANNOUNCEMENTS. The daily papers of our large cities constantly present anonymous announcements in which the undisclosed advertiser offers his services to the public as a legal practitioner either in a general way or, as is more frequently the case, as an expert in some special line. These announcements are sometimes signed with the name of an actual or fictitious corporation, but the usual plan is to invite correspondence by prospective litigants directed to a post office box. Now it cannot be denied that a lawyer, in the exercise of his own judgment, may make any of the branches of the law a specialty, and may invite the general public to test his ability in the line he has so chosen. But he must not, in so doing, use undignified means nor resort to low artifices, and, least of all, should not withhold his name from his ad-

vertisements.[61] The very fact that such advertisement is without signature indicates that the concealed advertiser feels a sense of shame in its publication, and no honorable practitioner will ever stoop so low as to commit an act that he will feel ashamed to own.

100. CONTINUED—DIVORCES. By far the larger portion of the species of advertising mentioned in the foregoing paragraph have for their object the solicitation of suits for divorce. Now the procuring of divorces is a legitimate branch of legal practice, and the law has made special provision for such separations. As before remarked, a lawyer has an undoubted right to pursue any branch of the law as a specialty, and, while we might question the taste of one who selects so unsavory a line for special work, there is no legal and possibly no ethical objection that can be urged against his adopting proceedings for divorce. But for any one to invite or encourage such litigation is most reprehensible,[62] and while any advertisement having this end in view is to be condemned, as contrary to the ethics of the bar, it follows, with stronger reason, that one who thus advertises by anonymous announcements has so far lowered the dignity of his calling as to merit the severe animadversion of his professional brethren and an application of the disciplinary powers of the court whose privileges he has abused.

[61] People v. Goodrich, 79 Ill. 148.
[62] People v. MacCabe, 18 Colo. 186.

101. The marriage relation, in law as in morals, has always been considered sacred, and it affects too deeply the happiness of the family, as also the welfare of society, and lies too near the foundation of all good government, to be disturbed or sundered for slight or transient causes. Therefore, the law has defined with certainty the only causes for which a judicial separation will be permitted and the methods that must be pursued to effect same. Neither judges nor lawyers may change this procedure. And yet, it is by no means uncommon to meet with advertisements to the effect that divorces may be obtained, through the medium of the advertiser, "quietly," "without publicity," "good everywhere," etc., and, to make the matter worse, the identity of such advertiser is frequently concealed behind a fictitious name or a postoffice box. Such an advertisement is not only objectionable from a moral point of view but is distinctly a false representation of facts and a libel on courts of justice.

102. It is a matter of common knowledge that divorces cannot be legally obtained anywhere "without publicity," nor even "quietly," for in every instance a public record must be made and a public hearing had before a decree can be entered. All of these public proceedings the statute imperatively requires, and for a lawyer, by an advertisement or otherwise, to indicate that such public proceedings can or will be dispensed with by the courts having jurisdiction of such cases, is a libel on the integrity

of the judiciary that courts cannot overlook when same is brought to their notice.[63]

103. A person enjoying the rights and privileges of an attorney must also respect the duties and obligations of his position. His license was granted on the express promise that he would at all times demean himself in a proper manner, and with the implied agreement that even though he should not, by his professional conduct, reflect honor upon the court appointing him, he would at least refrain from such practices as could not fail to bring disgrace upon such court, the bar, and himself.[64] The public and every individual coming in contact with him in his professional capacity, have a right to expect that he will act with the scrupulous propriety that should ever characterize one commissioned to so high and honorable an office, and when it shall appear that he has abused, or perverted to improper uses, the license he has received, it is the duty of both the bar and the courts to purge themselves of the unclean member.

104. CONTINUED—BAD DEBTS. Another form of highly objectionable advertisement is that of the "wages" and "bad debts" collector. This method of solicitation is usually made under the guise of a "bureau," "agency," "association," etc., and, to this extent, partakes of the character of anonymous an-

[63] People v. MacCabe, 18 Colo. 186.

[64] People v. Goodrich, 79 Ill. 148; People v. Brown, 17 Colo. 431.

nouncements. As a rule, the bait of "no fee unless successful" is held out to catch the economically disposed public, while not infrequently, where the statute permits the recovery of attorney fees by the prevailing party, the services of the "bureau" are offered free of charge.

105. This form of advertisement is quite as much to be condemned as the one discussed in the last section, in so far as it tends to lower the dignity and importance of the legal profession. It is open further to the still weightier objection that it is a proposal for litigation that practically amounts to common barratry. The policy of the law distinctly discourages the inciting or stirring up of quarrels and suits, and it is the vile brood of generators of petty strife and fomenters of neighborhood quarrels that has tended to bring the profession of law into disrepute.

106. It is not contended that the collection of claims, so-called, is not a proper subject for an attorney's work. Indeed, "collections" are usually resorted to by the young attorney as a stepping-stone to other and more lucrative forms of professional employment. And usually, also, the collections then obtained are of the sort to which the term "bad" may, with great propriety, be applied. The offense is not the undertaking to collect claims but the proposal for litigation and the indecent manner in which such proposal is made.

107. NEWSPAPER DISCUSSIONS. An attorney

has the same right as every other man to air his views upon any subject in the public press. Nor is he confined to matters external to his profession, and it is immaterial that the publication of such views may tend to exalt his professional reputation or bring him clients. This may be, and indeed is, a form of advertising, but it is nevertheless a legitimate one if properly effected. There was a time in the not far distant past when discussion of legal subjects by lawyers, in other than accredited law journals, was regarded with much disfavor, and it is still regarded as bad form for a lawyer to compile a legal work for popular reading. But the position and province of the lawyer has been materially broadened in recent years. He has become, in many respects, a leader of popular thought; his views upon all great questions of the hour are eagerly sought and received with deferential respect, and he is daily becoming more and more a power in society and civil life. The press is the most effective agency by which the public mind may be reached and influenced, and it has now come to be considered a proper channel through which to transmit professional views.

108. There is, however, a form of newspaper publication that the ethics of the bar sternly forbids, and this is where an attorney seeks to influence the public with respect to pending or anticipated litigation in which he has a direct personal or professional interest. The effect of such publication is to pre-

vent a fair trial and otherwise to prejudice the due administration of justice, and the attorney who resorts to such methods must inevitably lose standing in the profession.

109. LETTERS AND CIRCULARS. For a great many years it has been customary for lawyers to give notice of changes in the personnel of firms, removals, etc., by a simple announcement of the fact through the mails. While these announcements are usually intended as advertisements, and such is always their effect, yet their primary and ostensible purpose is merely to communicate a business fact to the public. This has always been regarded as a legitimate method of attaining publicity, and is fully sanctioned by long and unquestioned usage. A printed circular is generally employed for this purpose. The statements should be brief, severely concise, and modestly displayed. To depart from this standard is considered an exhibition of bad taste on the part of the advertiser.

110. This is about as far as a reputable practitioner may proceed in the way of circular advertising, and when an attorney transcends this limit, either by extolling his own abilities, his connections, or his facilities for transacting business, he approaches dangerously near the line that separates the lawyer from the shyster and pettifogger.[65]

[65] The term "shyster" seems to be an American colloquialism of unknown origin. It is defined by Webster as a "trickish knave; one who carries on any business, especially the

III. The unsolicited offer of professional assistance sent to a stranger is distinctly a type of shystering practice. In the cities we often find men, who, by reason of laxity in the requirements of admission to the bar, have been permitted to assume the office and enjoy the privileges of advocates with no adequate ideas of the dignity and importance of the legal profession. It is a cardinal rule with these men that a successful lawyer must "hustle for business," and by this is meant, in effect, a total disregard of all conventional rules and observances. The business community is overwhelmed with circulars, letters and other advertising devices; court records

legal business, in a dishonest way." A "pettifogger" is defined by the same authority, as "a lawyer who deals in petty cases; an inferior attorney employed in mean professional business."

Mr. R. L. Harmon, addressing the Ala. Bar Assn. in 1897, makes the following distinctions and definitions: "The pettifogger, as a lawyer, is an unlearned, little, mean character, lacking in ability, sound judgment or good common sense, while the shyster may be possessed of much learning, great ability or an abundance of shrewdness and cunning, but he is a trickster and a dishonest schemer; he is a fomenter of litigation, strife and discord in the community; he is a manufacturer of evidence, a fosterer of perjury and a promoter of bribery; he is a cunning thief, who conceals his perfidy and rascality under the cloak of the law; he cunningly abuses the noble profession to which he has been admitted as a weapon of offense in deeds of unjust oppression, scheming knavery and the procurement of confidence and the repose of trust, which he basely abuses, when there is opportunity to profit by so doing."

are searched for suits commenced, and defendants are written to with offers of assistance; prospective litigation is discovered and fomented; impertinent inquiries are directed to individuals as to whether they are satisfied with their present counsel, etc., and invitations are extended to call on the advertiser and inspect his wares. This is shystering, pure and simple, and it makes no difference that the advertiser occupies spacious and finely appointed offices with a retinue of clerks and assistants.

112. SELF PRAISE. It remains to speak of one other form of advertisement which our ethical canons have long condemned. Notwithstanding the attorney has been observant of the formal proprieties, he may yet be an offender against good taste by simply talking about himself and his own forensic achievements. It is said that no man of fine sensibilities will ever stoop to "blow his own horn," but must allow his praises to be sounded by others. With respect to the general truth of this proposition, there is no room for argument, and while the boaster may at times derive a profit from the recital of his own exploits, particularly with the simple and credulous, yet in the main their effect is only to excite aversion and disgust.

113. But while it is well to be "advertised by our loving friends," suppose they refuse to perform this office? What then? Now, it is not considered bad taste on the part of a scientist to relate his own discoveries nor to dilate on their value, while every

soldier is permitted to fight his battles over again for the benefit of his auditors. Then why may not the lawyer refer to his own experience, his struggles and his triumphs? There is no good reason why one should be permitted and the other prohibited.

114. The difficulty lies in the manner of the telling rather than in the thing told; but if time, and place, and circumstances, all invite it, there would seem to be no well-founded ethical objection to the lawyer's recital of the things he has accomplished, notwithstanding that, in effect, he is advertising himself out of his own mouth. But in this, as in every other form of promotion and publicity, a due regard for the proprieties must ever be observed, for in no other profession does the maxim that "Modesty bespeaks merit," so well apply.

CHAPTER V.

COMPENSATION.

Principles governing the right of compensation—Theory of compensation in England and America—Gratuitous service—Special agreements—Extent of compensation—Considerations affecting the extent of compensation—Contingent fees—Right of compensation of assigned counsel of poor person.

115. THE RIGHT OF COMPENSATION. In one of the oldest and most respected of ethical codes may be found the precept, "The laborer is worthy of his hire," and this precept never seems to have been seriously questioned save in the case of certain of the professions. Now, there can be no question with respect to the ethical truth of the precept. It coincides with our ideas of abstract justice. If one man renders valuable service to another, at the request of the latter, the person so serving should be suitably compensated. In case such compensation is withheld the servant should have a right to enforce payment by the power of the state. This principle the law fully recognizes, and has recognized from a very early period, yet, strange as it may appear, the right of an attorney to demand and sue for fees has been questioned in American courts during comparatively recent years.

116. The reason for this must be sought in the

peculiar character of the advocate's calling. It would seem that from the very earliest times, and in every country where advocacy has been known, it has been the custom to regard the services of the advocate as a gratuity. It is true that he has always been remunerated in some way, but the reward which the client bestowed was viewed in the light of an honorarium—a pure gift in token of gratitude—and not as the discharge of a legal obligation. It is said that this idea was maintained from a jealous apprehension lest the profession should degenerate into a mere mercenary trade,[66] but in its inception the theory of gratuitous service seems to have been based on higher and more chivalric grounds.

117. In the earliest forms of advocacy, where one appeared in a court to plead the cause of another, it was usually nothing more than a neighborly service, and for such intercession on behalf of a friend and neighbor no pecuniary reward was expected. Such service was substantially a help afforded by the strong to the weak, prompted by sentiments of pity or affection for one in distress. It would seem also, that the early advocates, in many instances, were clerics—priests or persons in holy orders—and their services were given without charge as a pious duty.

118. THE ENGLISH THEORY. When advocacy first became established as an exclusive profession, it was invested with a dignity which fell but little

[66] Forsyth, Hortensius the Advocate, Ch. IX.

short of that bestowed upon the judges. The barrister became an integral part of the court. He pursued his calling not for gain, but for the honor which it brought. The old custom of gifts to advocates was then in vogue, and while he might not take money as a payment for his services he might accept same as an honorarium, and so the custom continued under the new order of things. The practice thus inaugurated was never abandoned, and still obtains at the English bar, although for many years it has been a transparent fiction. In theory the English barrister exacts no fee but does expect his honorarium, "being indeed a gift which giveth honor as well to the taker as to the giver."[67] The English attorney, on the other hand, always seems to have charged for his services, and at present there is a graduated scale, fixed by law, for certain kinds of legal employment.

119. THE AMERICAN THEORY. While the general principles of advocacy are the same in England and the United States, there are yet some striking minor differences. These differences, to some extent, grow out of the fact that in this country the functions of attorney and counselor are united and the duties of the dual office are performed by the same person. But a more cogent reason may be found in the changed conditions of the American people and the position in which advocacy has thereby been placed. That the trained advocate is

[67] Sir John Davy, Preface to Reports.

a necessity in the administration of justice is now conceded. This trained class cannot be produced unless a proper provision is made for the maintenance of its members. They must be paid, either by the state, as in the case of the judges, or by the litigants who avail themselves of their services. Their contract with the suitor is essentially one of employment, and hence, for whatever service they may render, the law implies a right of compensation.[68]

120. The flimsy pretext of an honorarium has a nominal existence only in England. In this country it is unknown. The attorney, in every case, may demand and enforce such remuneration as shall compensate him for the time and labor actually expended and in fixing the amount of such remuneration the preliminary preparation for the assumption of professional duties is a proper factor. Without this, the profession of advocacy could not be maintained in this country.

121. Nor does this condition in any way militate against high ideals of professional independence, integrity, or moral excellence. Its general acceptance has not tended to lower the character or impair the dignity of the bar. Advocacy is still an honorable profession, notwithstanding its incidental abuses, and it by no means follows that because an advocate is animated by a hope of gain he thereby sacrifices any of the moral principles that prompt to action.

[68] Cooper v. Hamilton, 52 Ill. 119.

122. The attorney's right to charge and recover compensation for his professional services is based upon a contract of employment, which, as a rule, is initiated by a formal request on the part of the client, technically called a "retainer." But, while this is the usual method of creating the relation of attorney and client, it is not essential to the right of recovery that an express request should be shown. The contract of retainer may be made the same as any other; that is, it may be either express or implied, and when an attorney renders services under such circumstances as reasonably imply that they were performed with the assent and at the request of a party,[69] or where a party by his acts induces an attorney to suppose that his services are desired, and avails himself of them without objection,[70] the law will raise a promise of payment on which a recovery may be had.

123. LIABILITY FOR FEES. As a general rule, in the absence of a special agreement, an attorney must look to the person employing him for his compensation for services rendered, and cannot recover from one who did not employ him, however valuable may be the result of his services to such person.[71] Thus, if a number are interested in the subject-matter of the employment he can have recourse only against those who actually retained

[69] Cooper v. Hamilton, 52 Ill. 119.

[70] Ector v. Wiggins, 30 Tex. 55.

[71] Wailes v. Brown, 27 La. Ann. 411.

him.[72] So, too, although the employer is a trustee, and the services are rendered for the benefit of the trust estate, yet the attorney will not, in virtue of these facts merely, acquire any claim against the estate.[73] And, if an agent, through a false representation of his authority, secures professional services in the business of his principal, and it subsequently appears the agent was without authority, the attorney must rely upon the agent personally for the value of his services.[74]

124. GRATUITOUS SERVICE. Having established the fact, as a legal proposition, that a lawyer may demand and obtain compensation for his efforts as an advocate, it remains to inquire to what extent, if any, he may be expected to render gratuitous service in a worthy cause. We have no authorized scale of charges, as is the case with certain departments of legal practice in England, nor are there even conventional rules for the government and guidance of practitioners. The uniform practice has been to permit counsel to make his own estimates of value. One man, in the exercise of this privilege, may deem his services worth more than another, similarly situated, would or might have charged, and generally, unless the case is one of flagrant extortion, no ethical question is raised. The magnitude and importance of the matters in-

[72] Cook v. Mackrell, 70 Pa. St. 12.
[73] Hallam v. Hallam, 2 Cin. (Ohio) 384.
[74] Wright v. Baldwin, 51 Mo. 269.

volved, the time and labor necessarily required, and the circumstances of the parties, are all factors in the fixing of fees, and, except in cases of special assignment by the court, as where counsel is assigned to defend a criminal, no lawyer is compelled to accept a retainer if the client is unable or unwilling to pay the amount which he names as the price of his employment.

125. Yet, the poor we have always with us. They have rights to be established, protected and maintained, and the only persons, as a rule, who are competent for this purpose, are the lawyers. It will often happen that the establishment of a right will bring with it a pecuniary advantage sufficient to remunerate counsel for his services, and, in such case, a contingent fee may be provided for. But often, also, the right is of such a nature that it possesses no pecuniary features and its establishment will result in no pecuniary gain. In such event may counsel refuse his aid? It would seem that he may, for, whatever may have been the early characteristics of advocacy, he is under no other or greater obligations to society than the artisan. Nor will a refusal affect his standing at the bar.

126. But we should regard advocacy as something higher than a mere means of livelihood, and the advocate as something better than a hired gladiator who fights only for him that pays the best. Mercenary and calculating men may have lowered the level of the bar from the old chivalric

standard, but they have not destroyed the standard itself, and the cause of the poor, the helpless and the oppressed, remains today as it always was.

127. AGREEMENTS FOR COMPENSATION. Before an attorney undertakes the business of his client he may properly enter into a contract with him in regard to the compensation to be paid for the service, as no confidential relation then exists and the parties deal with each other at arms' length.[75] The attorney may fix the terms of his employment and the manner in which his service shall be rendered, and if the client assents thereto the contract is not distinguishable from other contracts relating to personal services requiring judgment and skill.

128. Where an agreement exists it must generally be taken as expressing the full measure of the attorney's compensation, and he will not be permitted to raise the amount therein provided during the progress of the suit to the seeming disadvantage of the client.[76] It is a familiar dictum that the law will scrutinize with jealous care all transactions between parties who stand in confidential relations, and under this principle courts on several occasions have declared that an agreement made by a client with his counsel, after the latter had been employed in a particular business, by which the original con-

[75] Elmore v. Johnson, 143 Ill. 513; Bingham v. Salene, 15 Oreg. 208.

[76] United States v. Coffin, 83 Fed. Rep. 337; Kisling v. Shaw, 33 Cal. 425; Ross v. Payson, 160 Ill. 349; Burnham v. Heselton, 82 Me. 495.

tract is varied and a greater compensation is secured to counsel than may have been agreed upon when he was retained, is void.[77]

129. Where parties enter into an agreement for compensation, prior to the engagement of counsel, it is customary to stipulate for a sum to be paid in advance, known as a retaining fee, and for other sums to be paid as the work progresses, and these sums may be collected according to the terms of the agreement. In the absence of an express stipulation, however, even though there be an agreement fixing the gross sum to be paid, no fees can be demanded in advance; the contract is regarded as single and entire, and no right of compensation accrues until the services are fully performed.[78]

130. EXTENT OF COMPENSATION. Where an attorney has entered into an agreement with his client in respect to the character of the service to be rendered and the compensation to be paid therefor, he is entitled, on performance of the service, to demand and receive the sum so stipulated and agreed upon.[79] But this sum will constitute the full extent of his compensation, irrespective of the actual value to the client of the service rendered. It is only in exceptional cases, however, that agreements of this kind are made, for an attorney can

[77] Lecatt v. Sallee, 3 Port. (Ala.) 115; and see, Elmore v. Johnson, 143 Ill. 513.

[78] Bathgate v. Haskin, 59 N. Y. 533.

[79] Schamp v. Schenck, 11 Vroom (N. J.) 195.

rarely see in advance the direction and extent of the litigation upon which he is entering, and, for this reason, it is seldom that a fixed sum can be named that will be just and fair for both parties. The general custom, therefore, is to defer the ascertainment of the amount of the attorney's compensation until the termination of the ligitation or the particular business involved.

131. Where the amount of compensation is not fixed by any contract or agreement under which the attorney is employed, he is entitled to demand, and may recover, such reasonable fees, under an implied contract, as his services may have been worth, or as have usually been paid to others for similar services.[80] What is a reasonable fee in a given case is a question of fact, to be determined, in case of dispute, by the weight of the evidence.[81]

132. The general rule of *quantum meruit* is based upon a market price, and this, in the case of professional services, is the price usually charged for similar services. But the rendering of professional services is not like the sale of commodities, where the price at which an article sold may have a tendency to fix or show the market price, nor can the amount paid in a particular case be considered or accepted as the proper amount to be charged in all like cases. There may be peculiar circumstances

[80] Elmore v. Johnson, 143 Ill. 513; Lecatt v. Sallee, 3 Port. (Ala.) 115; Eggleston v. Boardman, 37 Mich. 14.

[81] Lamar Ins. Co. v. Pennell, 19 Ill. App. 212.

or elements that assisted in fixing the amount paid in one case, which would not exist in another, and hence, while the question of reasonable worth must be determined from the prices usually charged for similar services, yet, in such determination, all of the attendant facts and circumstances must be considered.[82]

133. The strong tendency of recent decisions is to disregard many of the ancient rules which were formerly resorted to, and to announce in their place the better and more sensible doctrine, that no regular measure of value can be fixed for services of counsel in trying difficult cases or investigating intricate questions of law.

134. The result of the litigation, whether successful or otherwise, may have some effect upon the question of worth, and influence the fixing of the price demanded, but an attorney's right of compensation is not lost merely because his services have been of no benefit to his client, if they have been faithfully and intelligently rendered.[83] Upon the same principle, if a client prevents his attorney from completing the service contracted for the right of compensation is not lost, and the attorney may recover as though he had fully performed it.[84]

135. CONSIDERATIONS AFFECTING THE EXTENT OF COMPENSATION. Pursuing the ideas presented

[82] Eggleston v. Boardman, 37 Mich. 14.
[83] Bills v. Polk, 4 Lea (Tenn.) 494.
[84] Kersey v. Garton, 77 Mo. 645.

in the last section it may be said, that while the usual rule of *quantum meruit* applies as well to services rendered by attorneys as to those of persons engaged in other lines of business, that is, that the attorney may charge and recover whatever his services were reasonably worth, yet, in arriving at a standard of value, much difficulty is often experienced, while the measure of compensation is largely affected by circumstances that are wholly lacking in the ordinary cases. The value of professional service is necessarily determined by many considerations besides the mere time noticeably employed in the conduct of a suit or other legal proceeding, nor should compensation be limited to services rendered in trials, in the narrowest technical meaning of the word.[85] The importance and results of the case are prime factors in the adjustment of fees, for these, to some extent, afford a measure of the skill, care, responsibility, anxiety and effort demanded of and borne by the attorney, and hence should not be disregarded in determining the question of the value of such services.[86] The amount involved in the suit is material, and has much to do with the value of the service as well as the degree of responsibility which the attorney has assumed,[87] while the learning and ability of counsel

[85] Louisville etc. R. R. Co. v. Reynolds, 118 Ind. 170.

[86] Selover v. Bryant, 54 Minn. 434; Eggleston v. Boardman, 37 Mich. 14.

[87] Babbitt v. Bumpus, 73 Mich. 331.

as well as the means of the client, are all elements to be considered.[88]

136. IMMODERATE COMPENSATION — OVERCHARGE. It is frequently asserted that lawyers charge and recover fees vastly in excess of the real worth of the services rendered therefor. Indeed, this has furnished the material from which have been manufactured many cheap jokes and much alleged satire. The idea had its origin in an inadequate conception of the value of legal services, induced by the superficial views which the laity generally take of the profession. Even though we admit that grasping and sordid tradesmen, taking advantage of the circumstances and situation of the parties, seek to, and do, extort unconscionable fees, yet such occurrences are rare and much of the popular clamor is wholly unfounded in fact.

137. There will probably be no question upon the proposition that an attorney who conducts litigation for another, in the absence of a special agreement respecting compensation, is entitled to be reasonably remunerated for his time and labor. But the reasonableness of an attorney's charge for services, as shown in the last paragraph, must be determined by many things other than the mere time and labor actually expended. An attorney is under an implied duty to use and exercise reasonable skill, care, discretion and judgment in the conduct and management of his client's cause; he

[88] Halaska v. Cotzhausen, 52 Wis. 624.

is subject to violent mental strain; he necessarily assumes a degree of responsibility commensurate with the magnitude of the interests involved and the hazard of the litigation. In fixing the amount of his fee these matters are all proper elements, and courts have held that the care, responsibility and mental anxiety, necessarily arising in a proceeding of any importance, are not so imaginative and shadowy that they should not be considered in arriving at a proper sum to be allowed for professional compensation.[89]

138. The client, in most cases, looks only at the time employed in the trial and measures values by a standard of visible evidences, and, while he frequently makes allowances for the professional standing of his counsel, he rarely takes into account the other factors of the service. Hence, it will often happen that the attorney's bill is denounced as extortionate and unconscionable when, in fact, it is below the sum that in justice and fairness should be paid.

139. RETAINING COMPENSATION FROM FUNDS COLLECTED. An attorney may, in a proper case, deduct from funds collected by him, and in his hands, such sum as he may deem adequate for the service rendered, and, if such sum shall seem just and fair under all the circumstances, he will be permitted to retain same. But where the attorney thus

[89] Halaska v. Cotzhausen, 52 Wis. 624; Vilas v. Downer, 21 Vt. 419; Stanton v. Embrey, 93 U. S. 548.

reimburses himself, notwithstanding the client may have assented thereto at the time, if the transaction has even the appearance of unfairness it will be vacated upon application of the client seasonably made.

140. The reason for this is, that the relation of attorney and client is one of great confidence, and the attorney, by reason of his commanding position, is presumed to exert a strong and controlling influence over the client. It is said, this influence may be employed to obtain undue advantages, or even gratuities, and hence, the law will often declare transactions between them void, which, between other persons, would be unobjectionable. This principle has been held to extend to settlements of the amount of fees, and, if the client can show that the sum retained is larger than the services of the attorney were reasonably worth, or larger than agreed upon if there was an express contract, then the burden is cast upon the attorney of showing that the sum was retained by virtue of his client's agreement and consent, given under circumstances that made it fair and conscionable.[90]

141. As affected by local rules and schedules of charges. Sometimes bar associations prescribe rules with respect to the compensation to be charged by its members for certain kinds of service and the conditions under which such service shall be rendered. As bar associations do

[90] Balsbaugh v. Fraser, 19 Pa. St. 95.

not enjoy the apparent immunities of the trade union, it is not unlikely that a combination of this kind would fall within the inhibition of the anti-trust laws of many of the states, and, in such event, legal questions of considerable perplexity would be presented. We will not stop to discuss this phase of the matter, however, nor the right of attorneys to regulate the conduct of the members of their own order. If the rules in fact exist, then the attorney is under a moral obligation to observe same, and is justified in conforming to them in fixing the amount of the charges which the client is to pay. But the obligation of conformity is wholly personal with the attorney. In the absence of a special agreement, or proof that the client employed the attorney with knowledge of an implied assent to the rules, he is not bound to pay for the service according to the rates that may have been fixed by the schedule of the bar association, but is liable only for what they are reasonably worth. As between the members of the association the rules would be binding, as they would also be with respect to others who assent to them, but, in the absence of such assent, the right to recover for services must be determined and the amount of such recovery ascertained, by the general law and not by the rules of the bar.[91]

142. CONTINGENT FEES. It has now become a common practice to accept retainers under an agreement that no fee shall be charged for the service rendered except in the event of a successful deter-

[91] Boylan v. Holt, 45 Miss. 277.

mination of the suit, and usually, in such event, a larger compensation is to be paid than would have been charged had such agreement not been made. This is known as a *contingent fee,* and the increased sum that is recovered in the event of success is regarded as a fair offset to the risk of loss that would have resulted in the event of failure. In many cases it is a further element of the contingent fee, that the sum so to be recovered in the event of success shall be a part or arise out of the subject-matter of the litigation.

143. But the legal sanction for contingent fees was long withheld, and not a few of the conservative element of the bar still condemn the practice as contrary to good morals and the ethics of the profession. It would seem that in England contingent fees are held to be within the inhibition of the statutes of champerty and maintenance, and such, at one time, would seem to have been the view entertained in this country.[92] The early cases look upon the practice as a virtual purchase of a law suit, and maintain that, as a sworn officer of the court, an attorney should not be permitted to avail himself of the knowledge he acquires in his professional character, to speculate on suits pending therein.

144. The ancient common-law offenses of champerty, maintenance, barratry, etc., are but little regarded in this country at the present time. As a rule the ancient statutes have not been re-enacted,

[92] Arden v. Patterson, 5 Johns. ch. (N. Y.) 48.

although, in some states, champerty is still punishable as at common law and contracts tainted with it are void. Where the common-law offenses have been abolished a statutory offense of maintenance has generally been created, and this, in the main, consists of an officious intermeddling with a suit or the furnishing of means for its prosecution with a view to promote litigation.

145. The courts, however, seem to have drawn a line between champerty and contingent fees. Thus, if client and attorney enter into a contract whereby the latter is to institute and prosecute suits, at his own expense, for the recovery of property or other thing belonging to, or claimed by, the client, for which his only compensation is to be a portion of the property or thing recovered, then, however honestly entered into and carried out, the contract, it seems, is champertous and void.[93] On the other hand, if the agreement simply contemplates that the attorney shall contribute only his labor and skill, the client furnishing the money for costs and expenses—in other words, the capital—the contract is valid, and without taint. It may be said, and with much truth, that the distinction is subtle, but it is a distinction nevertheless which the courts have made and which they continue to recognize.

146. The ancient doctrine of maintenance grew out of conditions which do not exist and never have

[93] Thompson v. Reynolds, 73 Ill. 11; Coleman v. Billings, 89 Ill. 183.

existed in the United States. Having little or no foundation in reason it has fallen into disuse, and the general rule now is that any person claiming a right may contract to pay, for legal services rendered in vindicating it, a stipulated portion of the thing, or of the value of the thing, when recovered, the payment to be dependent solely upon such recovery, instead of paying, or contracting to pay, a sum certain and in any event.[94] Such an agreement does not conflict with the law as now administered, nor does it, in any proper sense, contravene any principle of public policy. Hence, such contracts are now generally sustained and about all that the law will do in such a case is to scrutinize the transaction and see that it is fair, and that no improper advantage has been taken either of the necessities or the ignorance of the client.[95]

147. CONTINUED—ETHICAL OBJECTIONS. It would seem, therefore, that no question can be raised as to the lawfulness of this method of compensation, and, if it is lawful to enter into contracts of this character, are they open to ethical objections? The answers to this question are as various as the minds of men. By some it is contended that, even though we admit the legality of the practice, it is yet inconsistent with that high standard of

[94] Newkirk v. Cone, 18 Ill. 449; McDonald v. R. R. Co. 29 Iowa, 170; Cain v. Warford, 33 Md. 23; Ballard v. Carr, 48 Cal. 74.

[95] Chester County v. Barber, 97 Pa. St. 455.

moral excellence which the members of a learned and honorable profession should ever propose to themselves; that its effect is to reduce the counsel from his high position of an officer of the court, to that of a party litigating his own claim, and that, having now a deep personal interest in the event of the controversy, he will cease to consider himself subject to the ordinary rules of professional conduct, and, as a consequence, there must come a lowering of professional character.[96]

148. A better laid objection, perhaps, is found in the fact that it places attorney and client in a new and dangerous relation, that of partners in a common enterprise. The attorney is no longer an agent, to follow instructions or advise his client, but a principal, with a right to speak and act as such. It must be admitted that this objection is not without much force.

149. It is also urged, as an ethical objection to contingent fees, that their tendency is to unduly encourage litigation and that many would never think of entering upon a law suit if they knew that whether they should win or lose they would yet have to pay their lawyer. But when an attorney can be found who is willing to assume any kind of a claim, upon a contingent agreement for compensation, it reduces legal practice to a sort of a lottery, turns the lawyer into a sordid huckster, lowers professional character and destroys professional honor.

[96] Sharswood, Legal Ethics, 160.

150. On the other hand, it is contended that if a person could not secure counsel by a promise of large fees in case of success, to be derived from the subject-matter of the suit, it would often place the poor in such a condition as to amount to a practical denial of justice. It not infrequently happens that persons are injured through the negligence or wilful misconduct of others, but who yet, by reason of poverty, are unable to employ counsel to assert their rights. In such event their only means of redress lies in gratuitous service, which is rarely given, or in their ability to find some one who will conduct the case for a contingent fee. That relations of this kind are often abused by speculative attorneys or that suits of this character are turned into a sort of commercial traffic by the "personal injury" lawyer, does not destroy the beneficent idea last discussed. So it will be seen that much can be said in favor of contingent fees, viewed solely from an ethical standpoint.

151. COMPENSATION OF ASSIGNED COUNSEL. While the rule is general that an attorney rendering service to another is entitled to compensation therefor, it is yet subject to an important exception. It is a familiar provision of the criminal codes of all of the states that, where a person is charged with the commission of a crime, and is unable to employ counsel to conduct his defense, it shall be the duty of the court to assign counsel to such person for

this purpose. A counsel so selected is obliged to serve, and that, too, without compensation.

152. It hardly seems just that a person thus conscripted and compelled to serve, should also be obliged to give his time and talent as a gratuity, and in many states the injustice has so far been recognized that a nominal fee, payable from the public treasury, has been provided. But, in the absence of such provision, an attorney thus appointed is without remedy and can recover nothing for his services from the county wherein the trial was had.[97] As the service is compulsory this looks very much like an attempt to appropriate the property and labor of another without just compensation, and this theory has often been advanced as a reason for remuneration by the state.

153. In answer to the foregoing it is said, that attorneys rendering services of this character do receive a compensation in the privileges conferred by their licenses. That while the law confers on licensed attorneys rights and privileges it also imposes duties and obligations, and that these must be reciprocally enjoyed and performed. The right to assign counsel to poor prisoners is inherent in the court; the duty of accepting such assignments is incident to the advocate's office, a burden, as it were, imposed upon it. When an attorney applies for and receives his license he takes it burdened with this duty, and having voluntarily accepted the

[97] Johnson v. Whiteside County, 110 Ill. 22.

privileges he is deemed also to have assumed the attendant obligations, and must be held to their performance. When he defends a criminal, under an assignment of the court, he but performs an official duty, and, if no compensation is provided for such service, none can be claimed.[98]

154. While, in practice, the judicial prerogative of assigning counsel is usually confined to criminal cases, yet it seems the court has the right to command the services of counsel, for persons unable to pay, in civil cases as well, and this right is still occasionally exercised.[99]

155. FORFEITURE OF RIGHT OF COMPENSATION. In many respects an attorney, in the conduct of a litigation or the management of an estate, resembles a trustee, and the rules that govern trustees will, in a measure, apply to him, particularly in the matter of compensation. He sustains toward the client and those interested, a special relation of trust and confidence not unlike that of a trustee. The old rule allowed no compensation for the performance of a conscientious duty, and this rule affected both trustees and counselors. In modern practice the old rule has been reversed and a trustee is now allowed, as a matter of right, a reasonable and just sum in payment for his services, upon the principle

[98] See, Johnson v. Whiteside County, 110 Ill. 22; Wayne County v. Waller, 90 Pa. St. 99; Rowe v. Yuba County, 17 Cal. 61.

[99] House v. White, 5 Baxter (Tenn.) 690.

that he who renders an honest service is entitled to an honest compensation therefor.

156. It is equally well settled, however, that if a trustee has been guilty of fraud, willful default, or gross negligence in the administration of the trust, compensation to which he would otherwise be entitled, will, as a general rule, be denied to him, and this rule has always been regarded as just and wholesome.[1] Its enforcement tends to secure an honest and faithful discharge of official duty and to curb the temptation to abuse the trust. The contract which the law implies from an attorney's employment is that he will render faithful and honest service; that he will be reasonably prudent, careful and dilligent; and that he will bring to the work in hand a fair measure of skill and technical learning. If this contract is violated he is not entitled to any compensation for his services, and if injury results he may further be held to answer in damages. The basis of the rule is good morals and a sound public policy, and, where the fraud, bad faith, neglect or ignorance of the attorney is made to appear, courts will not hesitate to apply it.[2]

[1] 2 Perry, Trusts, § 919.

[2] See, Davis v. Nat. Bank, 78 Minn. 408.

CHAPTER VI.

GENERAL PRACTICE.

Defined—The place of morality in practice—The duty of veracity—The client and his cause—Production of testimony—Examination of witnesses—Instructing and advising witnesses—Attorneys as witnesses—Addressing the jury—Tampering with records—Abuse of process—Duty to third persons.

157. DEFINATORY. The actual application of the lawyer's knowledge and skill to the ordinary affairs of life is called *practice.* This includes not only the direction and conduct of litigation, but every form of legal effort and activity. It involves all of the professional relations he may sustain and covers everything he may do or say in his professional capacity. The special features of such relations are reserved for succeeding chapters, while the paragraphs immediately following will be devoted to brief considerations of a few of the general phases that our subject may seem to present.

158. MORALITY IN PRACTICE. For many years the legal profession has been the object of attacks, by an ill-informed element of the laity, on account of the methods observed in practice. We commence to meet with these detractions at a comparatively early stage of professional development, and the time-worn argument that the lawyer's occupation

is to employ all the resources that learning and skill can supply in advocating whatever cause he is paid to undertake, and in specious and plausible attempts to make the worse appear the better side, still continues to find expression.[3]

159. That venality exists among certain members of the bar it would be idle to deny. Unfortunately, men have been admitted to the privileges of advocacy who are utterly incapable of understanding its duties or assuming its responsibilities, and, until a more rigid rule of moral qualification shall be applied, such men will probably continue to be admitted. Through their baneful influence and pernicious example the ancient standing of the profession has been perceptibly lowered, and it devolves upon the younger element now coming in—the men for whom these lines are penned—to restore to all

[3] A good example is afforded by Swift, who, in the "Voyage to the Houyhnhnms," makes Gulliver tell his master, the Grey Horse, that "there was a society of men among us, bred from their youth in the art of proving, by words multiplied for the purpose, that black is white, and white is black, according as they are paid. To this society all the rest of the people are slaves. It is likewise to be observed, that this society has a peculiar cant and jargon of their own, that no other mortal can understand, and wherein all their laws are written, which they take special care to multiply; whereby they have wholly confounded the very essence of truth and falsehood, of right and wrong, so that it will take thirty years to decide whether the field left me by my ancestors for six generations belongs to me or to stranger three hundred miles off."

their pristine vigor the principles that made the profession of law a calling of honor.

160. But, while we are forced to admit the occasional abuse of the advocate's privileges by unworthy men, yet we may strenuously deny the general truth of the statement of our detractors above noted. No lawyer of standing supposes himself to be a mere agent of his client, to gain a victory in the particular case in any event and at all hazards, but, knowing what is due to himself and his honorable profession, his efforts are qualified not only by considerations affecting his own character as a man of honor and learning, but also by considerations affecting the welfare of society and the general interests of justice.[4] The men whose names stand highest on the roll of fame have been pre-eminent for these qualities, and the young advocate, ambitious for advancement, will find that he will best conserve his own interests by emulating their example.

161. THE DUTY OF VERACITY. It is said, that truth is the foundation of every virtue, and in the practice of law its due observance is absolutely essential to that kind of success which should constitute the lawyer's highest ambition. But modern society has produced many conventions, and the practice of law is not without them. Therefore, some moralists have gone so far as to say that, in the case of advocates, these conventions may be per-

[4] Hutchinson v. Stephens, 1 Keen (Eng.) 668.

mitted to supersede the general rule of truth.[5] In support of this it is contended that the profession of advocacy exists as an instrument in the administration of justice; that it is a necessary maxim of the advocate's profession that he is to do all that can be done for his client; that the application of the laws is a matter of great complexity and difficulty; that their application in doubtful cases is best provided for if the arguments on each side be urged with the utmost force, leaving the judge alone to decide, and that, for this purpose, each advocate must urge all the arguments he can devise and with all the skill he can command. Further, that this duty is not affected by any belief of his own upon the subject.

162. But this does not, in all respects, represent the thought of the better element of the bar, neither does it coincide with the practice of those who see in the conduct of lawsuits something more than mere forensic battles waged by paid champions ready to espouse either side of an argument. We may therefore turn to another class of moralists, whose views more truly express the fundamental ideas involved in legal practice. It is generally admitted that, to answer the ends of justice in a community, there should exist a profession of advocates, ready to urge, with full force, the arguments on each side in doubtful cases. And if the advocate, in exercising his profession, allows it to be

[5] See, Paley, Moral Philosophy, b. iii, c. 15.

understood that this is all he undertakes to do, then it is further conceded he does not transgress his duties, even in pleading for a bad cause; since even for a bad cause there may be arguments, and even good arguments. But if, in the conduct of the cause he asserts his belief that it is just, when he believes it to be unjust, if he advances as true, that which he knows to he untrue, he offends against truth; just as any other man would do who, in like manner, made the same assertions.[6]

163. It is further contended by this school, that every man is, in an unofficial sense, by being a moral agent, a judge of right and wrong and an advocate of what is right; and is, so far, bound to be just in his judgments and sincere in his exhortations. This general character of a moral agent, it is contended, cannot be put off by merely putting on professional character, for every man, when he advocates a case in which morality is concerned, has an influence upon those around him which arises from the belief that he shares the moral sentiments of mankind. This influence of his supposed morality is one of his possessions, which, like all of his possessions, he is bound to use for moral ends. If he mix up his character as an advocate with his character as a moral agent, using his moral influence for the advocate's purpose, he acts immorally. He sells to his client, not only his skill and learning, but himself, and makes it the supreme

[6] Whewell, Elements of Morality, b. iii, c. 15.

object of his life to be, not a good man, but a successful lawyer.[7]

164. It is further urged by the moralists, that the advocate must look upon his profession, like every other endowment and possession, as an instrument which he must use for the purposes of morality. That to act uprightly is his proper object; to succeed as a lawyer is a proper object, only so far as it is consistent with the former. Making all due allowances for the vagaries of the non-professional mind we may yet say that the foregoing is in full accord with the precept and practice of the legal profession, and the sentiments above expressed must commend themselves to every thoughtful man. And while it is true that the law has conventions, and that without them the forms of justice could not be successfully administered, yet these conventions are not inconsistent with the general rule of truth, nor does their employment necessitate any insincerity on the part of the advocate.

165. THE CLIENT AND HIS CAUSE. The matters discussed in the preceding paragraphs bring us to a consideration of some of the more practical phases of advocacy, and the moral position which the advocate sustains in respect to same. To every disputed question of fact there must, of course, be two sides, and in nearly all questions of the application of law there is room for honest contention and

[7] Whewell, Ibid.

difference of opinion. It is immaterial that one side is right and one side is wrong, or that one attorney has assumed to represent the wrong side of the contest. The only moral question involved is, whether he has thus assumed to represent iniquity knowing it to be such. Now it is a matter of common observation that two eye-witnesses of an event never see it exactly alike and, however honest or impartial they may be, will never, if left to themselves, describe it in the same terms. Thus, take the case of an affray. The situation of the witnesses, the excitement of the moment, the unconscious bias produced by the state of the feelings, all tend to affect their view, producing even opposite aspects of the memory. If such differences arise in the recollection of impartial persons, it cannot be surprising that each of the combatants is confident that he is the injured party, and communicates his case, in that confidence, to his counsel. Sympathy is the soul of advocacy. The result is that the statement of a case is generally such as to induce in counsel a strong belief in the justice of the cause, and to enlist his warmest feelings for its success. This is a plain statement of the ordinary case.

166. To one thus prepossessed in favor of the cause, the animation of the contest only deepens and strengthens first impressions; and as the little chapter of life, with all its living interest, opens around him, his client's case becomes a part of his

own being. His belief in its justice insensibly but inseparably blends with his natural desire to succeed, and he hears all the arguments and regards all the testimony against it, with the surprise, dislike, and incredulity of inveterate opinion sharpened by zeal. In this spirit he conducts the case, and even though defeated he remains, in many instances, unconvinced, feeling that there has been a failure of justice and vainly regretting the insufficiency of his own exertions. Thus it will be seen that an advocate may honestly engage on either side of a cause dependent on disputed facts, notwithstanding that such case involves a direct opposition of truth and falsehood. The antithesis of right and wrong, considered as legal concepts, will be found in all disputed cases. But it does not follow because of this, that the counsel who supported the losing, and hence the wrong, side of the controversy has thereby offended against morals.

167. But right and wrong in legal contests are very seldom separated by sharply defined lines. It does not follow, because one side has lost, that it was wholly destitute of the elements of right nor that the prevailing side may not have shown wrongful features, for, in most cases, the truth is drawn from both sides and the ultimate right is reached by the efforts of the advocates on either side. Thus, in an action on the case for unliquidated damages, the counsel who shows the wrong to be compensated, and he who suggests the grounds of mitigation, may both be right, each taking his own share

in presenting the truth to the minds of the jury. Unfortunately, the moralists never seem to grasp these distinctions, and it is because of the superficial views which they generally take that much of the misconception of the advocate's office has arisen.

168. PRODUCTION OF TESTIMONY. The decisions of courts, in all disputed matters, are based on the existence or non-existence of facts. Facts are established by the evidence produced at the hearing, or trial of the cause. The truth of the matter in dispute is reached by a consideration of the testimony, or the statements of the witnesses. These statements, in the case of living witnesses—persons, are delivered orally and under the sanction of an oath. This oath is a promise on the part of the witness that, in the cause then on trial, his testimony shall be "the truth, the whole truth, and nothing but the truth." To speak the truth at all times is a moral duty; to speak the truth in judicial investigations is a legal duty as well.

169. It is contended by the moralists that the concealment of any truth which relates to the matter in dispute is as much a violation of the oath as a false statement; that the duty to speak "the whole truth" requires of the witness a complete and unreserved account of all that he knows respecting the subject of the trial, whether the questions proposed to him reach the extent of his knowledge or not.[8]

[8] See, Paley, Moral Philosophy, b. iii, c. 17; Champlin, Principles of Ethics, 111; Wayland, Moral Science, 304.

If this be true, then a corresponding duty would certainly seem to devolve upon counsel to disclose every fact connected with the case, including those that tend to operate against him as well as those that go to support his contention.

170. But this view, like many of the visionary and fanciful theories of the moralists, is rejected in legal practice. No person is under obligation, legal or moral, to tell the whole truth, even when interrogated thereon, if the answer would tend to criminate him, for the law will not compel any man to be a witness against himself. So, too, from motives of public policy, transactions arising in a number of relations are not permitted to be disclosed, even though the effect of such rule is to suppress the truth. The law has further provided a certain formula for the production of testimony, and one of the delicate arts of the advocate, in the employment of such formula, is to present only those matters which tend to promote his cause and to suppress those which militate against it, and the examination of witnesses is conducted with this end in view. While the duty of counsel, in examining a witness, certainly is to elicit the truth, and nothing but the truth, yet only so much of it as, in his judgment, may be calculated to benefit the cause of his client,[9] and the books contain many rules and suggestions based on this theory.

171. Nor does this theory, and the practice that

[9] Reynolds, Theory of Evidence, § 117.

is built upon it, in any way contravene the precepts of a sound morality, however much it may conflict with the self-erected standards of the moralists. A party feeling himself aggrieved, from any cause, applies to a court for redress. He states his grievance and, in so doing, makes certain averments. These averments he must sustain upon the hearing or be non-suited. That is about all there is to it. He must prove all that he has averred, but no more than he has averred, and all that is required of him, in the first instance, is to produce evidence sufficient, if undisputed, to establish the truth of the matters alleged.[10] If the allegations are denied this is a matter of defense, which plaintiff is not required to anticipate, and the production of testimony to sustain such defense is left to his adversary. It is by these methods that courts arrive at the truth of the matter in dispute, and the long experience of many centuries has demonstrated the wisdom of the procedure. While the witness is sworn to tell the "whole" truth, this means nothing more than that he shall not wilfully conceal any matter concerning which he may be interrogated nor suppress the truth of same when it is called for. The witness is under no obligation to volunteer information, and usually will not be permitted so to do, nor is counsel required to bring out any fact that he may deem prejudicial to his case.

172. EXAMINATION OF WITNESSES. It is not

[10] Stearns v. Field, 90 N. Y. 640.

proposed to present a disquisition on the examination of witnesses, nor to suggest methods by which this delicate function of the advocate's occupation shall be exercised, but, in a work purporting to discuss the ethical side of practice a passing allusion to the subject seems eminently proper if not necessary. In no other department of professional activity does the astute lawyer display to better advantage his legal acumen, and cases are lost and won, in many instances, by the ability or non-ability of counsel in dealing with the evidence. The books are replete with suggestions relative to the manner in which examinations should be conducted and the methods to be employed, and to them the reader is referred, the only object of the following paragraphs being to show, in a very general sort of a way, what should not be done from an ethical point of view.

173. EXAMINATION IN CHIEF. The first great rule of direct examination is that a witness must not be interrogated by leading questions. The rule is both wise and expedient and probably exerts a more beneficial effect in the eliciting of evidence than any other. But, while it seems very easy of application, it has yet been found extremely difficult to be observed in practice, and, if strictly enforced, would often prolong trials to an undue and wholly unnecessary extent. Therefore, it has been narrowed somewhat in its scope by confining it to such questions only as relate to the matter in issue. It is the proper practice to approach material matters

by direct questions, and this practice is always encouraged by judges who are not themselves mere legal martinets, yet there are always some lawyers who desire to appear smart, quick, and attentive, and the leading question generally offers an easy mark for fustian forensic display. And so, whenever an opportunity offers, and frequently only for the sake of interruption, they are on their feet with an objection. Now, this is simply an exhibition of priggishness; nothing more. It does not indicate either learning or skill, and it is offensive to every man of liberal instincts. An objection should always be made where it would properly seem to lie, but it is bad form to continually interject them into examinations designed only as preliminary to the real matters involved in the issue.

174. But while it is now permitted to lead a witness up to the point at issue, yet, when the questionable matter is reached, the rule applies in all its stringency. This every lawyer is presumed to know, and no honorable practitioner will intentionally violate the rule. Indeed, there are but few things that more unmistakably stamp the pettifogger than a persistent line of questions designed to assist the witness or suggest the answers.

175. CROSS-EXAMINATION. The right of cross-examination is justly regarded as a valuable privilege in the trial of contested cases, and the rules of evidence do not permit the introduction of testimony which has not been, or cannot be, subjected

to this test. But, like every other provision of law, it is intended only to further the course of justice in the ascertainment of truth. Therefore, it is a privilege that should be used only for the end intended and never abused or perverted from sinister motives.

176. The main objects of cross-examination are; to destroy or weaken the force of the testimony given on the direct examination; to elicit something in favor of the examiner's side of the case; or, to discredit the witness. These ends counsel is permitted to attain, if possible, by all fair means; but only by fair means. It is his undoubted privilege to correct the mistaken and to confound the liar; but only the liar. He has a right to employ all the resources of his art to detect mistakes and expose falsehood, but it is mean and contemptible to seek to entrap a witness into a falsehood, or to confuse and perplex him, with a design to discredit him, when counsel does not believe him to be swearing falsely. It is no more permissible for counsel to tamper with the truth in others, or cause them to confound or conceal it, than to be false himself. Nor should he descend to the more insidious art of inducing a witness to answer with one meaning and assume his reply to bear another, and thus lead him to give evidence, which, intended to be true, shall have the effect of falsehood. Such conduct is a species of criminal trickery so nearly allied to sub-

ornation of perjury that it is difficult, from a moral point of view, to distinguish between them.

177. Unfortunately instances of the foregoing are too common in counsel, who, with misdirected zeal, esteem everything permissible that contributes to the success of their client's cause. But, in time, such men invariably lose caste in the profession, are distrusted by the judges and rejected by juries. No lawyer can long continue in the practice of confusing the honest, brow-beating the timid, falsely construing the words of a witness, or placing in his mouth words that were never uttered, without acquiring the character of a trickster. Men will look with suspicion upon everything that he says or does, and will finally come to deny to him the credit of truthfulness even when he is dealing honestly with them.

178. When counsel has reason to believe that a witness is lying, and is so assured in his own mind, then he may treat him as a liar and deal with him accordingly. A cross-examination is largely under the discretion of the court, and, for the purpose of testing the credibility of a witness, counsel will usually be permitted to cover a wide range of inquiry. But, in such cases, the interrogatories should be directed only to this point. The privilege does not carry with it the right to indulge in irrelevant investigations of the private life of the witness, nor to propound questions intended only to degrade and humiliate him before the jury. Attacks of this

kind, under the guise of cross-examination, are not only unjustifiable in morals, but directly tend to bring the administration of the law into disrepute, and to lessen the respect of the people for courts of justice. Therefore, no lawyer who desires to maintain the high standing of his profession will abuse the privilege of cross-examination, and judges who appreciate the true nature of the judicial function will always correct such abuse where same is attempted.

179. OFFERS OF IMPROPER EVIDENCE. As previously remarked, a lawyer, a licentiate of the courts, is presumed to be conversant with the rules of evidence, and, being so conversant, is expected to conform to their requirements in the trial of causes. The temptation to overstep the bounds is often very great, particularly with a witness who is either timid or stupid, and, in such cases, courts are ever inclined to construe the rules with great liberality. But while counsel may be pardoned for an infraction of the rules, where his only object is to elicit competent evidence, no such clemency can be extended to one who deliberately and persistently endeavors to submit evidence that is clearly incompetent and which, as a lawyer, he is presumed to know is incompetent. Yet this is a common offense on the part of many who would resent the imputation of unfair practices, and no little ingenuity is often employed to draw out statements that are promptly stricken out, yet, having in fact been

heard by the jury are not without influence in the framing of the verdict. This has always been regarded as highly improper, and he who resorts to such methods places himself on the plane of the shyster and pettifogger.

180. Another device is to make an offer of proof with an argument for its admission, the argument being intended not for the court but for the jury. It has been said that the offer of evidence which counsel knows the court must reject as incompetent, for the mere purpose of the effect which the argument of its admissibility will have upon the jury, is an artifice unworthy of a lawyer. As a general proposition, this is true; and where the practice is persistently followed the offender should be subjected to discipline. It is hard, however, to draw the line at all times between the proper and the improper in the presentation of testimony, and while counsel often offer incompetent testimony, and strenuously insist that it shall go to the jury, it is difficult to say, in many cases, that the motive is not honest.

181. COACHING OF WITNESSES. A very important question is raised when we come to inquire into the extent to which a counsel may instruct the witnesses who are to testify in a trial. The law guards the production of testimony with jealous care. It will not even permit a leading question, if relating to a material issue, to be put or answered. This is not because the answer may not be true, but because

it has been suggested by the manner in which the question was framed. In such a case the answer is not regarded as the free act of the witness, but rather as the suggestion of counsel, and because such answer has, to a certain extent, been molded by another, the testimony is rejected as incompetent.

182. If this is true of leading questions put during the course of a trial, what shall be said of the suggestions made to witnesses during the preparation for a trial? How far is an attorney justified in suggesting or dictating the answers that may or shall be made to questions that may be put, either by himself or opposing counsel, at the hearing? It must be confessed that the question is one of great difficulty in its proper solution.

183. It is generally conceded that a discreet and prudent attorney may very properly ascertain from witnesses, in advance of the trial, what they in fact do know, and the extent and limitation of their memory, as a guide to his own exertions, but this, it has been held, is as far as he may go, legally or morally.[11] His duty, it is contended, is to extract the facts from the witness, not to pour them into him; and, while he has a right to learn all that the witness does know, he has no right to teach him what he ought to know.

184. In the foregoing proposition we have only the simple question of the propriety of instructing a witness; the truth or falsity of the answers is not

[11] Matter of Eldridge, 82 N. Y. 161.

considered; it is the fact of instruction only with which we are now concerned, and this, it seems, is a violation of professional ethics. In support of this position it is contended, that a court, before whom an issue is pending, has a right to the independent and unwarped testimony of a witness; that where the answers are furnished by another the court obtains neither the language nor the memory of the witness, but only that of his teacher, and that when such testimony has been offered and received a fraud is committed on the court. If the perpetrator of this fraud is the counsel in the case, then, as an officer of the court he has offended, he may be subjected to its summary discipline, and punished for a derogation from professional integrity.

185. ADVISING WITNESSES. There is another phase of the subject discussed in the last paragraph that may properly claim our attention in connection with it, and this we may distinguish as advice given to witnesses. While counsel may not assume the role of instructor, he may, with propriety, advise his own witnesses in respect to their testimony. The average witness will usually bring forward much that is incompetent, irrelevant and immaterial; it is a legitimate function for counsel to sift this and to inform the witness what is and what is not wanted. He may further advise the witness with respect to the character and methods of opposing counsel on cross-examination, and caution him in

regard to same. He may instruct the witness as to what evidence is and what is not admissible, and suggest to him his conduct and demeanor while on the stand. Indeed, in many cases this would be his duty. It will rarely happen that men who are unused to the procedure of courts can take the stand without some previous advice, and do justice to either themselves or the parties.

186. A careful lawyer will always confer with his witnesses in advance. He will ascertain what they know and the facts to which they can testify. He will endeavor to see where he is strong as well as where he is weak, and will take due precautions to guard his vulnerable points. Now, it may be that he does not desire all of the facts within the knowledge of the witness, and, while the witness is under a duty to tell the truth, it is only the truth so far as he may be interrogated. There is no impropriety in counsel advising his witness not to speak of certain matters unless specifically questioned with respect to same. This is not "coaching," in the sense in which that term is ordinarily employed. Neither is there anything improper in cautioning a voluble witness against saying too much, nor in urging a reticent one to tell all he knows, even though in so doing suggestions are required to be made. Again, the witness must frequently be shown the difference between what he actually knows and what he merely surmises, and, to do this, "instruction" is essential.

187. A favorite device with many lawyers is to commence a cross-examination by asking the witness who he has talked with about the case, or, by asking him if he has not discussed his testimony with opposing counsel. The effect upon the witness is usually embarrassing, particularly if he is ignorant or simple. He sees in the question only an imputation that he has been coached for the occasion, and, in his anxiety to dispel this idea, not infrequently answers in such a manner as to expose his own veracity to impeachment. Of course, this was just what the examiner intended when the question was propounded. All this may be avoided by cautioning the witness in advance, and by directing him to answer fully and frankly all questions that may be put to him respecting the persons with whom he has talked as well as the times and places where such conversations occurred. Such advice is not only proper but, in most cases, should be given as a part of the attorney's duty.

188. BRIBING WITNESSES. Approaching a witness for the purpose of influencing his testimony, being an attempt to obstruct the administration of justice, has ever been considered gross misbehavior on the part of an attorney. If the act occurs in the court house it is punishable as a contempt, but, wherever it may have happened, it subjects the offender to discipline. As this offense strikes at the very foundation of judicial determination a wide discretion is reposed in courts with respect to the

punishment they may inflict, quite irrespective of the laws that may be enacted to preserve the peace and dignity of the state, and the cases are numerous where the discretion has been exercised.[12]

189. But, it will frequently happen that witnesses are reluctant or unwilling to attend and testify, and sometimes will even stand out for a sum of money to be paid them for their testimony. It is true, a witness within the jurisdiction may always be brought in by subpœna and compelled to testify. Yet, the experience of every lawyer in practice has been that the testimony of an unwilling witness is often very unsatisfactory, and that money, paid or promised, is usually a powerful stimulant for weak memories. Now the question is: Do such payments or promises constitute bribery, or the semblance of bribery?

190. The statutory witness fee is very small. Attendance at court not infrequently entails pecuniary hardship on the person testifying. The exigencies of his business or the circumstances that surround him may be such that to spend a day or several days in court will seriously embarrass him. Because of these things it has become common to pay or promise to witnesses the actual value of their time consumed in the trial, and it does not seem that such practice is repugnant to any rule of law or precept of morals. With respect to contin-

[12] Ex parte Savin, 131 U. S. 267; In re Brule, 71 Fed. Rep. 943.

gent fees agreed to be paid to witnesses in the event of the successful termination of the matter in dispute there may, perhaps, be some room for question. By such a course they become actually interested in the result of the suit. But this, in itself, is immaterial, as interested parties may now testify the same as others and interest no longer constitutes a disqualification. If the witness is called to tell the truth and not to bolster up a falsehood, then, notwithstanding he has been promised more than the statutory fee, it can, in no just sense, be called bribery. Its effect is not to obstruct the administration of justice, but rather to facilitate same.

191. The law contemplates that a witness shall be paid for his time as well as reimbursed for his expenses, and no witness can be compelled to testify in a civil case unless his fee has been paid or tendered. In the case of experts, large fees are now demanded and openly paid. In principle there is no difference between the witness who testifies to opinions, and the witness who testifies to facts; both are simply aids in the ascertainment of truth. In order that every one may have the benefit of witnesses to support their contention the legal fee has been reduced to a minimum, but there is no rule of law that prohibits the payment of more than the statutory allowance. The gist of the question seems to lie in the purpose with which the money is paid or promised, rather than in the payment or promise itself. If such purpose is to corrupt the

witness, either by inducing him to testify falsely or not to testify to what he knows, then it is bribery, and punishable as such.

192. WITNESS IN HIS OWN CAUSE. It is an unwritten law of the legal profession that an attorney may not be a witness in the cause he is conducting. The rule is scrupulously observed by every self-respecting lawyer, and yet it seems to rest wholly on ethical grounds. It is not contrary to any statute, nor even to any maxim of the common law, for an attorney to take the stand for his client, and while courts may endeavor to discountenance the practice they are powerless to prevent it.[13] It would seem that in England it has been held a person may not appear in the double capacity of witness and advocate, but in this country the courts have done no more than to condemn the practice as indecent and in violation of professional propriety.[14]

193. An attorney occupying the dual position of witness and advocate necessarily subjects his testimony to criticism, if not to suspicion, and, if he has any pecuniary interest in the result of the suit, places himself in a strictly unprofessional attitude.[15] If it becomes necessary for him to testify, or if he voluntarily offers himself as a witness, then, in common decency, he should withdraw from the case.

[13] Morgan v. Roberts, 38 Ill. 65.
[14] Frear v. Drinker, 8 Pa. St. 521.
[15] Ross v. Demoss, 45 Ill. 447.

194. There may, perhaps, be occasions when an attorney is justified in taking the stand, as when the trial develops some unlooked for phase which directly implicates or impugns his professional integrity, but such occasions will be few and far between.

195. The rule that excludes the attorney from the stand as a witness to facts should be equally potent in excluding his unsworn opinions. It is a common practice for lawyers, in discussing the evidence, to assert their own belief in the truth of the statements of witnesses or the justice of the cause they are advocating. This is a species of testimony, and is so intended by the speaker. But what counsel may believe or disbelieve, is wholly immaterial. His province is to induce belief in others. This he accomplishes, if at all, by the clearness and cogency of his arguments. The arguments are based on the facts of the case, and the occasions will be rare when he is justified in throwing the weight of his own private opinion into the scale to favor the side he represents. There may be times when peculiar circumstances seem to call for such a course, but no lawyer can hope to command respect for opinions of this nature that are freely volunteered in every and all sorts of cases.

196. ADDRESSING THE JURY. The subject of our last paragraph brings us to one of the most important of the lawyer's functions in practice—the argument to the jury. The value of the jury

as a factor in modern trials is an open question, upon which there exists a wide diversity of opinion. But, whatever may be its worth or worthlessness, it is yet a factor in the determination of many disputed matters of fact, and much of the forensic effort of the advocate lies in attempts to persuade and convince this branch of the court. It is the right of counsel to address the jury upon every matter legitimately bearing upon the particular case, and about the only inflexible rule that can be applied to his address is: he must keep within the evidence. But the evidence may be examined, analyzed, collated, sifted and generally treated in his own way. Whatever of argument, suggestion, or inference can be constructed or deduced from it in support of his hypothesis, or whatever of doubt, confusion, or uncertainty he may be able to create with respect to that of his opponent, is permissible, and he may present his own views with all the ingenuity, persuasion, vehemence, fervor and effectiveness at his command.[16]

197. But it must be remembered that the verdict should be impartial and pronounced upon the evidence. It follows, therefore, that the address of counsel must be upon the evidence and according to the evidence. He must state the facts as they were developed during the trial, and not as he may think they should have been. He may state them as forcibly as possible, but he must not en-

[16] People v. Smith, 162 N. Y. 531.

large them. He may palliate, but not distort them. He may extenuate, but not misstate. In no field of legal effort does the truly great advocate more conspicuously appear than before the jury; in no field is the chicanery and trickery of the pettifogger more clearly displayed.

198. ABUSE OF THE OPPOSITE SIDE. There was developed during the early part of the last century a class of advocates that deemed it the highest stroke of policy to load with opprobrious epithets and abuse the counsel, clients, and witnesses on the opposite side. This was practiced not alone at *nisi prius,* but in the more dignified forum of the appellate court as well, and so widespread and deep-seated did this pernicious practice become that rarely if ever did it call forth a rebuke from the court. It is a matter for congratulation that, save in exceptional instances, the practice seems to have died with the forensic lions (?) that inaugurated it, and, notwithstanding the few sporadic manifestations of old-time methods occasionally seen, a higher and manlier spirit actuates the bar of the country in their legal disputations and debates than was perceptible half a century ago. The practice originated in mistaken and perverted views of qualities and effects, and although it wore the semblance of intrepedity and courage it was, in fact, only an exhibition of rank cowardice.

199. The young attorney who thinks he will attain fame as a trial lawyer by adopting this boorish

and generally discarded practice makes a grave mistake. He may receive the plaudits of the ignorant and uncouth, but he will excite only disgust in the minds of those most competent to judge, and whose good opinions it should be his constant effort to acquire and retain. Nor do such exhibitions indicate the possession of those qualities that bring success in modern practice. They are the devices of small and ill-informed minds; the arrogant assertions of presumptuous self; and are resorted to only by the boor, the shyster, the pettifogger and the moral degenerate.

200. TAMPERING WITH RECORDS. The official records of courts, and the files of judicial proceedings, are so far invested with an element of sanctity that their integrity may not be impaired by an unauthorized act. If, through any cause or from any reason, it becomes proper that they should be corrected, altered, or amended, leave therefore must first be obtained and the change produced under the same safeguards that applied when they were originally made. It is immaterial that the alteration may be slight or inconsequential, or that its only effect may be beneficial to all parties concerned, for no one other than the court may assume to pass upon the question.

201. If this be true, then it follows, with much stronger reason, that an attorney may not tamper with a record, file, or document, in order to make it express that which before it did not, and thereby

cause it to serve his own purposes to the detriment of his adversary. Such an act clearly evidences a want of moral sense which renders him incapable of appreciating and discharging the duties and obligations of a lawyer toward the public, the bar, and the court, and neither ignorance nor inexperience can be urged in extenuation of such an offense.[17] Where such a dereliction of professional duty is shown, the courts, to protect litigants and maintain their own dignity, may summarily discipline the offender by striking his name from the roll.

202. ABUSE OF PROCESS. The law has provided a regular method of procedure for the vindication and protection of rights. The courts are intrusted with the administration of this procedure, but its practical application rests largely with the lawyers, who, as the ministers of justice, are presumed to adapt it to the varying wants of suitors and the exigencies of particular cases. The process by which legal ends are attained has, in large measure, been committed to the bar, to be by it employed for the legitimate purposes of litigation, and notwithstanding that the details of service, levies, etc., are performed by the executive officers of the court the direction and control of such work still remains with the attorney who is conducting the case.

203. But lawful process may be, and often is, abused, and while ostensibly employed in the fur-

[17] People v. Moutray, 166 Ill. 630.

therance of a proper purpose may yet be made the means of working rank iniquity. When the abuse is flagrant the courts will rarely refuse to relieve against it, and in some cases will intervene to punish the offender. Not infrequently, however, while the abuse is conceded, courts are practically powerless to abate the evil or reach the evil-doer. The question then resolves itself into a matter of pure ethics, and public opinion, as in other ethical affirmations, is about the only force that can affect the parties engaged in the nefarious transactions. Until the moral sense of the bar shall become sufficiently strong to assert a controlling influence so long will the fair fame of the profession suffer from acts of legalized piracy.

204. The matter under discussion finds frequent examples in connection with justice courts and other tribunals of limited and inferior jurisdiction. Thus the law gives to justices of the peace a concurrent jurisdiction throughout the county. This fact is frequently taken advantage of by unscrupulous practitioners to harass and annoy persons against whom they may have demands, and process is issued and made returnable at distant parts of the county and at inconvenient hours. It often happens, in such cases, if the defendant answers the summons, that the plaintiff fails to appear, and the case is dismissed, only to be commenced again in the same manner, and is so continued until finally a "snap" judgment is entered by default. This is distinctly

an abuse of process; a rank perversion of the machinery of the law, and a degradation of judicial functions, but while it violates the canons of ethics it infracts no legal rule, and the remedy therefor lies only in the forum of conscience.

205. DUTY TO THIRD PERSONS. The duties of an attorney to his client, his professional brethren, and the court, is reserved for more specific treatment in subsequent chapters, and we may close our observations of general practice by a cursory view of the duties of an attorney to third persons considered not as constituting the public—society—but as individuals. It may be stated as a general proposition that, in the absence of fraud, falsehood, and collusion, an attorney is under no professional obligation or duty to a third person. In some instances distinguished lawyers have contended that the rule is absolute and imperative, without exception or qualification. Thus, Lord Brougham[18] is reported to have said:

206. "An advocate, by the sacred duty which he owes his client, knows in the discharge of that office but one person in the world, the client and none other. To save that client by all expedient means—to protect that client at all hazards and cost to all others, and among others to himself—is the highest and most unquestioned of his duties. He must not regard the alarm, the suffering, the torment, the destruction which he may bring upon that other."

[18] Address on the trial of Queen Caroline.

207. But this extreme view has never met the approbation of the bar, either in England or America, and is repudiated by the great majority of reputable practitioners. While admitting the rule, which is in every way just and reasonable, it must yet be held to apply only to the knowledge, skill, care and diligence of the attorney with respect to the particular case in which he is engaged. To the client he is under certain obligations, for the just fulfillment of which he is legally as well as morally bound. But to third persons, where no privity exists and where there is no fraud or collusion, he is under no duty, and even though injury may result to them, through his negligence or want of skill, they would still be without remedy against him.[19]

[19] Bank v. Ward, 100 U. S. 195; Dundee Mtg. Co. v. Hughes, 20 Fed. Rep. 39.

CHAPTER VII.

CRIMINAL PRACTICE.

Generally considered—The retainer—Duty to persons accused—Knowledge of prisoner's guilt—General duties in defense—The prosecution of criminals—Duty of persons officially charged with prosecution—Propriety of private counsel assisting in prosecutions—Dangers of criminal practice.

208. GENERALLY CONSIDERED. Probably no topic relating to legal ethics is more frequently alluded to, or more generally discussed by the public, than the duty of an attorney in defending a person charged with crime; and probably, also, there is no subject upon which the public are more prone to arrive at superficial and erroneous conclusions. For many years it has furnished a fruitful theme for shallow-brained declaimers and writers of moral homilies, and apparently has lost none of its pristine vigor and usefulness as an ever ready and available illustration of the perversity of law and lawyers. Let us then examine this question for ourselves and endeavor, if possible, to ascertain the true course of professional duty.

209. It is now a guaranteed right of every person charged with an infamous crime—treason or felony—to be confronted with his accusers and to be represented by counsel if he so desires. He has

a right to a fair trial; that is, a trial conducted according to the forms which prudence and experience have devised as conducive to the security of life and liberty. As has been well said: "These are the panoply of innocence, when unjustly arraigned; and guilt cannot be deprived of it without removing it from innocence."[20]

210. But this was not always so, and when we read the reports of some of the English state trials of former days and see the rank iniquity with which they were conducted,[21] we feel that no language will so well describe their true nature as the harsh term "judicial murder." For many years a prisoner charged with felony was not permitted to call any witnesses in his own behalf,[22] nor was he permitted to have counsel, and when this latter privilege was finally given to him his counsel was not permitted to address the jury nor comment on the evidence, but was strictly confined to advising the court upon the law of the case. Many specious reasons for a practice so revolting to our ideas of justice may be found in the old books, but the chief one seems to have been that the court was counsel for the prisoner and was supposed to watch over and guard his interests.

211. It would seem also that there was an ethical

[20] Sharswood, Legal Ethics, 90.

[21] The bloody assize of Jeffreys is only one of many examples.

[22] 4 Black. Com. 359.

question involved, for one old writer[23] advances as a reason that "our law doth abhor the defense and maintenance of a bad cause," and this, he says, is one of the reasons "why our law doth not allow counsel unto such as are indicted of treason, murder, rape, or other capital crimes; so as never any professor of the law of England hath been known to defend (for the matter of fact) any traitor, murderer, ravisher, or thief, being indicted and prosecuted at the suit of the king. * * * and therefore it is an honor unto our law that it doth not suffer the professors thereof to dishonor themselves (as the advocates in other countries do) by defending such offenders." The inherent viciousness of the foregoing is seen in that it assumes to fix the question of guilt, not upon the facts to be proved, but upon the character of the crime with which the accused stands charged. Yet this, for many years, may be said to fairly represent the spirit of the English law. From time to time slight innovations were made upon the severity of the rule, but attempts to remedy the evil by legislation were long and obstinately resisted, and it was not until 1836[24] that the last remnant of this barbarous practice was finally swept away.

212. In the United States, notwithstanding the harsh doctrines of the old law seem to have been applied to some extent during the colonial period, a

[23] Davy's Reports, Preface.

[24] 6 and 7 Wm. IV., c. 114.

more wise and humane policy has always prevailed. From the institution of the present government it has always been a cardinal rule, that every man charged with crime shall be adjudged only on the evidence produced. If the evidence is weak and inconclusive, it is the sworn duty of the jury to acquit. If the charge itself is so inartificially framed that it will not sustain a conviction, it is the duty of the judge to dismiss the suit. This procedure is believed to be eminently just and wise; it is the result of time acting on experience, and represents the slow outgrowth of preceding ages in ideas of abstract justice.

213. Nor does such procedure in any way militate against a sound morality, even though its effect, in some cases, may be to permit a guilty man to escape. It is the privilege of the accused to point out deficiencies of indictment or evidence, and, this being true, there can be no violation of moral duty on the part of counsel who assumes to do this for him. The popular clamor, so often heard, concerning the loopholes in the meshes of the law, whereby criminals go unpunished, is but the veriest bosh, and it is immaterial that much of this clamor originates with men who assume to be teachers of morals. That our criminal law is perfect and our legal machinery without defect, no one asserts; but we have made a great advance over the "good old days" when poor and decrepit women were ruth-

lessly and brutally sacrificed on the altar of justice by pious and God-fearing men.[25]

214. THE RETAINER. Except when duly assigned by order of court to defend a poor prisoner, a lawyer is under no legal duty to accept a criminal retainer, nor will he, by such denial, violate any ethical canon. It is his right to so deny, if he deems it the proper course to pursue. He is under no obligation to palliate and defend iniquity of any kind in a court of justice, or to undertake a cause which his soul abhors, and his condition would be that of an abject and miserable slave if, as some would contend, he were to be at the command of every miscreant who might choose to employ him.

215. But there are times when acceptance seems a moral duty, and when to do so may require no small degree of moral courage. If the offense charged is one that has deeply affected the community, creating against the accused a strong adverse feeling, an attorney assumes a great risk in accepting a retainer to defend and, upon more than one occasion, lawyers have lost both friends and practice by espousing an unpopular cause. In such a case, if the lawyer is timid, or, to employ a more euphemistic term, conservative, he will generally decline

[25] Even so perfect a character as Sir Matthew Hale was guilty of this crime, and condemned to death two poor and innocent women, in violation of the plainest rules of justice, and against whom there was no evidence that ought to have been given any weight in the mind of a reasonable man, though he believed in witchcraft.

the retainer. This he may do with the utmost propriety. On the other hand, if he is brave, he will accept, and, whatever the laity may think of him, if he is a good man and acting from a sense of chivalrous duty, he must surely rise in the estimation of every reputable practitioner.

216. In the ordinary case, while a lawyer may decline a retainer in the exercise of his own discretion, he is equally at liberty to accept, and neither the character of the client nor the nature of the charge should form an objection. The only question is, whether he is willing to undertake a criminal defense. Nor should counsel decline a retainer merely because he may believe the accused to be guilty. As was eloquently said by the great Erskine: "If the advocate refuses to defend from what he may think of the charge or the defense, he assumes the character of the judge, nay, he assumes it before the hour of judgment; and, in proportion to his rank and reputation, puts the heavy influence of perhaps a mistaken opinion into the scale against the accused, in whose favor the benevolent principle of English law makes all presumptions and commands the very judge to be his counsel."[26]

217. PROFESSIONAL DUTY TO PERSONS ACCUSED. An attorney employed to defend a person charged with crime is under a duty to use every means, consistent with honesty and fairness, to secure an ac-

[26] Camp. Lives of the Chancellors, Vol. 6, p. 361.

quittal for his client. If he believes him innocent this, in itself, will be a spur to effort, but even though he may feel that the prisoner is guilty, this, in itself, should not be a deterrent.

218. Before trial he should carefully examine the indictment under which the prisoner is held. If it is defective or insufficient for any reason he should at once bring his objection before the court. This is a clear and positive duty, and counsel assumes a fearful responsibility if he knowingly fails to make an objection to the indictment, which, if taken, would be fatal to the prosecution of the suit.

219. During the progress of the trial he should seize every point the law allows as a protection for his client, for that same law which the prosecutor is wielding as a sword he has a right to employ as a shield. He must insist on the due observance of every safeguard that the law has provided, and if any legitimate avenue of escape appears he betrays his trust if he fails to avail himself of it.

220. KNOWLEDGE OF PRISONER'S GUILT. Not the least among the indictments of the legal profession, found by the self-constituted conservators of public morals, is the assertion that lawyers have no conscientious scruples against defending a person charged with an infamous crime, although they may know him to be guilty. This, in the minds of many, is the depth of professional infamy, and a lawyer who will so far lower himself as to accept a retainer under such circumstances, or who will continue in a

case after such knowledge has been brought home to him, is regarded as utterly depraved and destitute of moral feeling. Probably no phase of our general subject is so often adverted to and so generally condemned as this, and therefore it merits our serious and candid consideration.

221. Now, it is a well-known fact of common experience that the professional moralist is usually a very one-sided person with a narrow mental horizon, and his disciples, as a rule, tend to develop the same characteristics. The lawyer, notwithstanding his constant practice of supporting one side of an argument, has a far wider range of mental vision and a better knowledge of applied ethics. While he deals with the law as it is, he is yet conversant with what it has been and what it tends to become, and his course is shaped by the lights of the past and the future, no less than by those of the present. He has debated this question long and earnestly. He has examined it in all its bearings and with every aid that time and experience can furnish. As a result of this profound and careful study he has announced the doctrine that counsel may, with no violation of moral duty, undertake the defense of a man charged with crime, whom he believes, or even knows, to be guilty.

222. If counsel has direct knowledge of the prisoner's guilt, as where the accused confesses same, he may well pause before assuming the defense, but he may, with the utmost propriety, pro-

ceed, and should he refuse so to do it is within the power of the court to compel him, as has been shown in another place.

223. The law, like charity, "thinketh no evil;" wherefore it has long been a cherished rule that every man charged with crime is presumed to be innocent, and this presumption continues until the prosecution, by proof, shall have established his guilt beyond a reasonable doubt. Of this rule the advocate is the intermediate minister, and he is justified, if not bound, to enforce its application to the inconclusiveness of the evidence adduced; and he may do this the more readily because even the jury themselves are bound to secure to the accused the benefit of its application.

224. Before the law all men are equal, and guilty men have the same right to be defended and to be represented by counsel as have the innocent. This right is extended to all in the furtherance of public justice, and is founded upon the principle that no one shall be convicted except on legal and sufficient evidence. But this principle also defines the scope and extent of the advocate's duty in conducting a defense of this kind. He is merely bound to screen his client from conviction on incompetent and insufficient evidence, and to use all fair arguments that may arise from the trial. He may expose the weak parts of the evidence against him and enlarge on those parts which tend to his favor; he may even exhibit, as fully and as forcibly as he

can, any hypothesis consistent alike with the evidence and the possible innocence of his client. But here the advocate should stop. The law and all its machinery are means, not ends; the purpose of their creation is justice; and he who in his zeal for the means forgets the ends, betrays his trust and demonstrates his own unfitness for his exalted office.

225. An attorney who assumes to represent the rights of a person charged with crime acts merely in his official capacity. The prisoner may be morally guilty, but the only question submitted to the jury is whether he is legally guilty—guilty upon the issue tried. The prisoner has a right to have the evidence against him fully tested before it is relied upon for a conviction. To secure the benefit of this right he must have counsel. This in itself is sound morality, and its denial now would rend the bonds of society.

226. It may happen that the knowledge of his client's guilt only comes to counsel after the trial has made considerable progress. It is contended by the pseudo-moralists that in such event the attorney should withdraw from the case. But this would be to break faith with the prisoner, and whatever may be the views of the laity it is now well established by judicial precedent that, where an attorney has taken a retainer to defend a prisoner he is not at liberty to withdraw during the trial merely because he discovers that his client is guilty. The duty of defense remains, and while the knowledge of guilt

may materially change the method of defense, the duty itself is unaltered.[27]

227. The foregoing remarks apply only to those cases where counsel has positive knowledge that his client is guilty. Mere suspicion, even where it may amount to belief, will not justify any relaxation of effort to secure an acquittal, for it will often happen that the most honest case may be destitute of evidence to support it while all the known circumstances point to guilt.[28] Such cases have occurred

[27] This phase of our subject was definitely settled during the first half of the last century, the principal precedent being an English state trial, now known as the Courvoisier Case, which was heard in 1840. See Appendix.

[28] Perhaps the most remarkable case of erroneous conviction that ever came under the cognizance of a court occurred in our own country during the last century. The case is as follows:

Two brothers, by name Boorn, were arrested in Vermont, in the year 1819, charged with the murder of one Russel Colvin. They were tried upon an indictment for the offense, in the Supreme Court of that state, at Bennington. The presumption of guilt was violent, drawn from many circumstances proved by different witnesses. They had quarreled with Colvin, and threatened his life. Nay, they were actually seen in violent personal contest with him, in a field, on the day of his disappearance. His disappearance was scarcely noticed at the time, for Colvin was a poor man; no one cared for him alive, and no one was interested to prove him dead. Some time after, however, bones were discovered, in a pit or natural hollow, in the field where the quarrel had been witnessed, and near the very spot of the supposed fatal altercation. These bones were identified as "not dissimilar" to such as might have composed the body of Colvin. In the same pit were also found a knife and one or more buttons, and the

many times in the past and will occur many times in the future.

228. PROSECUTION OF CRIMINALS. Thus far we have been considering our subject from the point of view of the defense. Let us glance at the other side. Of course, persons charged with criminal offenses must be prosecuted as well as defended. In the old days this was practically the only side to a state trial, and the record is not always creditable either to prosecutors or judges. All prosecutions, where the charge amounts to a felony, are conducted by a public officer—the state's attorney. With him there is no option; he must discharge the duty he has sworn to fulfil. But in the performance of this duty the man should never be extinguished in the prosecutor. His office demands his best efforts in all cases, but he is under no duty to secure a conviction in any case, and he fully discharges all of the obligations of his office by a proper and faithful presentation of the facts. His duty is performed, and well performed, when he has done all that lies

former was identified as having belonged to Colvin; and the latter as having been attached to his garments; and the prisoners *actually confessed* that they were guilty of the murder. They were convicted and sentenced to death; but, the annals of our criminal jurisprudence are not stained with the crime of judicial murder by the execution of that sentence; for Russel Colvin was all this while alive—was discovered as a farm laborer in New Jersey, whither he had wandered after his altercation with the Boorns, which they really supposed had resulted in his death. He was brought back in season to save the lives of the convicts.

in his power to bring out the truth of the issue in accordance with established rules of evidence. If the evidence tends to incriminate he has a right, and it is his duty, to make all proper arguments thereon to the jury; on the other hand, if the evidence is weak, or tends to demonstrate innocence, he commits a grave error in urging a conviction.

229. Too many prosecutors seem to think that their employment demands a conviction, and their attitude and bearing during the trial shows that the object is not simply to bring out the truth of the matter but to convict. In many counties where the fee system still obtains the public prosecutor is allowed a certain fee for conviction,[29] and too often the prospect of that fee is the one stimulating incentive that urges him on. The public prosecutor is an officer of the state. The state has said that no presumptions of guilt shall be raised against the accused and that he shall be fairly and impartially tried. Therefore, the state's attorney has no right to bring to a state trial any personal animus against the prisoner, nor should he, any more than any other citizen, be permitted to regard the accused as otherwise than innocent until he has been pronounced guilty by the jury.

230. On the other hand, the mere fact that a prosecutor may believe an accused person to be innocent gives him no right to slight his duty, for,

[29] This is also one of the grave defects of the Federal system of criminal procedure.

notwithstanding his belief, the prisoner may yet be guilty. Where a person has been held to answer a criminal charge it devolves upon the state's attorney to duly prosecute such charge regardless of his personal views. Whatever evidence he may have should be properly presented and whatever of fair argument may arise thereon should be made. It is for the jury to pass upon the question of guilt, not the prosecuting officer.

231. The same pseudo-moralists that so loudly condemn attorneys for defending persons whom they know or have reason to believe are guilty, are equally emphatic in their denunciation of prosecuting officers who insist on "persecuting" those whom they believe to be not guilty, and it is often asserted that a state's attorney is under a moral duty to enter a *nolle prosequi* whenever he is satisfied that a prisoner is innocent of the charge preferred against him. Nothing could be more pernicious or misleading. The prosecutor is under a legal as well as a moral duty to perform the functions of his office, and he commits a gross breach of his trust if he assumes to use the opportunities of his office to prevent accused persons from being tried. What his belief may be is wholly immaterial, and while it is true that he may, under certain circumstances, enter a *nolle pros.*, yet this is done, not because of his belief in the innocence of the accused, but as a measure of public policy and for the purpose of saving the public money, in cases where

it becomes evident that the accused cannot be convicted. In such a proceeding the guilt or innocence of the prisoner is immaterial.

232. PRIVATE COUNSEL IN CRIMINAL PROSECUTIONS. It not infrequently happens that private counsel are employed to assist the state. This is now generally regarded as an allowable practice, but for many years an attorney accepting such a retainer, particularly when his fee was paid by private parties, was considered as having violated an ethical canon of the profession. This was always the case when the charge involved a capital crime. "Never take blood money," say the old writers,[30] and if we are to credit the biographies of the ancient worthies they never did. In fact, the old Ciceronian idea seems at one time to have thoroughly pervaded the bar, and numerous admonitions have come down to us that where life or death is the issue, "it is always more honorable to defend than to prosecute." But this idea seems to have been denied effect in later years, and the mere fact of such employment will not, as a rule, cast unfavorable imputation upon the character of the advocate.

233. There is, however, a wide difference between the functions of the public officer and the private counselor. The former must, as a part of his official duty, duly prosecute all persons who have been presented by the grand jury or otherwise held to await trial on a criminal charge; the latter is

[30] Brown's, Forum, Vol. 2, p. 40.

under no duty whatever, and if he appears it is entirely a matter of his own volition. Therefore, while an attorney may be permitted to assist in a prosecution, it is yet a privilege that he should exercise with the utmost caution and circumspection, and never, under any circumstances, should he consent to aid in the conviction of one whom he knows or believes to be innocent. If he represents private interests, it has been held in some states, he cannot be retained to assist in criminal prosecutions growing out of such interests,[31] and the rule seems to be eminently salutary and just.

234. But, in any event, such retainers should be accepted with reluctance and only in extraordinary cases, where peculiar circumstances seem to justify the act. There is something revolting to the moral sense in the spectacle of counsel selling his talents to enable an individual to satisfy his thirst for vengeance, and this, in most cases, is just what counsel does when he accepts a private retainer to assist the prosecuting officer. In no case can counsel insist on entering a state trial on behalf of the people, and he is admitted, if at all, only as an act of grace on the part of the state's attorney.

235. CRIMINAL LAW AS A SPECIALTY. For many young lawyers the criminal courts seem to possess an overwhelming fascination. This is due, in large measure, to the notoriety that usually attends criminal trials, the opportunities which such

[31] See, People v. Hurst, 41 Mich. 328.

trials afford for the display of forensic eloquence, and the prominence into which the attorneys conducting same are frequently thrust. Hence it is, that many young and ambitious advocates are attracted to the criminal courts and after a brief experience therein conclude to devote themselves to this branch of the law as a specialty. There is no legal objection to this course. Criminal practice is a legitimate and necessary function of the advocate, and every man, as before remarked, has a right to select his occupation in life.

236. There are, however, many moral objections that may be urged. The criminal lawyer par excellence, the "eminent counsel" of the newspaper report, the lawyer of extensive fame, is almost invariably the defender, not the prosecutor, of criminals. His services are sought and secured by hardened guilt as well as hapless innocence, and his entire professional life is passed in close contact with malefactors of all kinds. We are assured by a high authority that "a man cannot handle pitch and not be defiled," and we may say, with equal certainty, that a man cannot continually stand as an apologist for crime and a defender of criminals without having his own moral sensibilities sadly blunted. There exists no necessity in any community for a criminal bar, and the lawyer who voluntarily devotes his talents and learning to this one branch of the law commits a great and ofttimes irreparable mistake.

CHAPTER VIII.

RELATIONS WITH CLIENT.

General observations—The relation of attorney and client—Attorney's authority, powers and duties—Liabilities and disabilities of the relation—Professional opinions and advice—Refusal of retainer—Conduct of cases—Representing both sides—Privileged communications—Adverse employment — Withdrawals — Inconsistent positions—Money lost by attorney or detained by him—Right of client to discharge his attorney.

237. GENERAL OBSERVATIONS. Thus far we have been discussing the general phases of professional conduct and the duties of counsel in practice. In this and the two succeeding chapters it is proposed to examine a few of the salient features of our subject that are presented in the relations sustained by an attorney to the client, the court and the bar. As coming first in order, the present chapter will be devoted to the client, for without the clients there would be little room for courts and none whatever for the bar. The relation of attorney and client comprehends many legal as well as ethical rules, but these will not be touched except as they are incidentally involved, and then only in a desultory manner. To guard against repetition no effort will be made to go over ground already traversed, and to avoid prolixity the discussions will be confined to general and broadly stated propositions.

238. THE RELATION. An attorney is essentially an agent. In fact, this is what the word "attorney" means, and the general principles which control in matters of agency are all applicable to attorneys. The special undertaking of an attorney is to establish or protect the rights of his client, whether relating to life, liberty, person, reputation or property. This necessarily creates a relation of trust and confidence between them which measures and defines the extent of the attorney's duty.

239. It was formerly held that to establish the relation of attorney and client a retaining fee must have been paid, but the modern doctrine is that, while such payment is the most usual and weighty item to evidence the relation, it is by no means indispensable. The essential feature of the professional relation is the fact of employment to do something in the client's behalf. It is still held, in some states, that there must be an agreement, express or implied, for compensation, but whether payment is made in part or in whole by retainer in advance is not material. Nor is it necessary that the liability for the compensation should be assumed by the client, although ordinarily it would be from the nature of the employment, which, in the vast majority of cases, involves the protection or enforcement of the client's interests against adverse claims.[33]

240. In general, however, the fact of employment is sufficient to constitute the relation, and

[33] Lawall v. Groman, 180 Pa. St. 532.

when such relation has once been properly created it continues until dissolved by the express act of the parties. During the continuation of the relation the attorney, for most purposes, stands in the place of the client, who will be bound by whatever the attorney may do or say, in the regular course of practice, in the conduct of the cause.[34]

241. ATTORNEY'S AUTHORITY, POWERS, AND DUTIES. The relation of attorney and client necessarily implies an authority on the part of the attorney to enforce his client's demands and to bind him as a party litigant in all matters relating to the suit or special transaction, and persons dealing with the attorney, in respect to his client's business, may justly infer that he has all the powers implied by such relation. Thus, he may employ all proper means to recover upon any claim that is placed in his hands, and if he obtains a judgment his authority continues in force until the judgment is satisfied. Therefore, he may pursue all lawful means to enforce such satisfaction,[35] as well as to protect the judgment if assailed in the same proceeding.[36] He is further authorized to receive payment of a judgment which he has obtained for his client, and such payment will bind the client as a satisfaction.[37]

[34] Beck v. Bellamy, 93 N. C. 129.

[35] White v. Johnson, 67 Me. 287; Ward v. Roy, 69 N. Y. 96.

[36] Sheldon v. Riesedorph, 23 Minn. 518.

[37] Frazier v. Parks, 56 Ala. 363; White v. Johnson, 67 Me. 287.

242. But, with the foregoing exceptions, the general powers of an attorney cease with the entry of final judgment,[38] and while he may collect the amount of the judgment when the same is for money only,[39] he has no authority to accept in satisfaction a less sum than that specifically recovered;[40] nor has he any authority, on payment of the full sum, to transfer or assign such judgment to another.[41]

243. For any act in excess of his general powers the attorney must have received a special authority to justify his own conduct and to render such act binding upon the client. Thus, in the absence of a special direction, he has no authority to compromise or surrender any right of his client,[42] neither can he delegate to another any of his own implied powers.[43] The authority conferred by the ordinary employment of an attorney does not extend to confessing or even consenting to a judgment against his client,[44] nor to compromising the amount of his

[38] Mayer v. Blease, 4 Rich. (S. C.) 10; Hillegass v. Bender, 78 Ind. 225.

[39] Conway County v. Ry. Co. 39 Ark. 50.

[40] Robinson v. Murphy, 69 Ala. 543; Roberts v. Nelson, 22 Mo. App. 28.

[41] Mayer v. Blease, 4 Rich. (S. C.) 10; Robinson v. Murphy, 69 Ala. 543.

[42] Wadhams v. Gay, 73 Ill. 415; Walden v. Bolton, 55 Mo. 405; Marbourg v. Smith, 11 Kan. 554.

[43] Dickson v. Wright, 52 Miss. 585; Wadhams v. Gay, 73 Ill. 415; Phillips v. Dobbins, 56 Ga. 617.

[44] Edwards v. Edwards, 29 La. Ann. 597; Pfister v. Wade, 69 Cal. 133.

claim,[45] or altering the terms of the contract or demand.[46] Nor will such employment imply authority to receive anything except money in satisfaction of the client's demand,[47] or to release any of defendant's property from the lien of the judgment which he obtains.[48]

244. But while an attorney has no general implied powers to discharge his client's judgment by receiving a less amount than the recovery, or by taking anything other than money in satisfaction, yet he may do so under a special authorization. Thus, where the claim is desperate and execution has been returned unsatisfied, and the client expressly directs the attorney to take a less sum or gives him a discretion to "do the best he can," as is very often the case, the attorney may settle on any terms that to him may seem advantageous, and the client will be bound by such settlement.[49]

245. LIABILITY FOR WANT OF SKILL. It has been judicially determined that when a person adopts the profession of law, and assumes to exercise its duties in behalf of another, for hire and reward, he impliedly represents that he possesses the

[45] Wetherbee v. Fitch, 117 Ill. 67; Maddux v. Bevan, 39 Md. 485.

[46] Pickett v. Bank, 32 Ark. 346; Mandeville v. Reynolds, 68 N. Y. 528; Bigler v. Toy, 68 Iowa 687.

[47] Wiley v. Mahood, 10 W. Va. 206; Bigler v. Toy, 68 Iowa 687; Kelly v. Wright, 65 Wis. 236.

[48] Phillips v. Dobbins, 56 Ga. 617.

[49] See, Vickery v. McClellan, 61 Ill. 311.

requisite knowledge and skill to properly conduct the matter for which he is engaged, and in his undertaking he will be held to employ a reasonable degree of both. If injury results to the client for want of such degree of reasonable care and skill the attorney must respond in damages to the extent of the injury sustained.[50]

246. It must not be understood, however, that an attorney, by accepting a retainer, thereby impliedly promises a perfect legal knowledge with respect to the subject-matter of his employment, nor that he will bring to it the highest degree of skill. The law recognizes the frailties and imperfections of human nature in lawyers as well as in others, and therefore exacts no more from them than from the laity. It requires that one who assumes to practice law shall possess the ordinary legal knowledge and skill common to members of the profession, and insists that, in the discharge of the duties involved, he will be ordinarily and reasonably diligent, careful, and prudent.[51]

247. But, while this is the extent of legal responsibility, it is yet contended by some writers that the field of moral responsibility is wider.[52] An analysis of their views, however, does not seem to justify their conclusions, and it may safely be said

[50] Stevens v. Walker, 55 Ill. 151.

[51] Wharton, Negligence, 749; Shear. & Redf. Negligence, 211; Wells, Attorneys, 285; Gambert v. Hart, 44 Cal. 542; Skillen v. Wallace, 36 Ind. 319.

[52] Sharswood, Legal Ethics, 77.

that counsel discharges his moral as well as legal duty when he brings to a case his best learning, ability and skill.[53] As a rule, he is not liable for errors of judgment, particularly with respect to matters of doubtful construction, but is presumed to know the law where it is clear and unequivocal. It would seem that the only ethical question arises out of the attorney's consciousness of his own failings and shortcomings. If he knows that his knowledge of the special matter is insufficient, or feels that he does not possess the degree of skill that may be necessary to insure successful results, he commits a grave wrong when he undertakes an employment thus beyond his ability. Under such circumstances he should have the moral courage to request associate counsel, or, if necessary, to decline the employment.

248. It is not meant, however, that counsel should ever stand timid and vacillating, with doubts of his own ability. It may be that the special matter presented opens a new and wholly untried field, and yet he may with propriety enter same. If he has a confidence in himself, in his own powers of intellect and endurance, then, notwithstanding the formidable appearance of the case, he may yet undertake it. If, on closer inspection, he finds obstacles that he feels he cannot surmount, or difficulties he cannot overcome, no false pride should deter him from asking for aid.

249. It is better in all matters of expediency to

[53] Gilbert v. Williams, 8 Mass. 57.

follow the instructions of the client, even though they may not coincide with counsel's own views. If failure or loss ensues it is then easy to fix the responsibility. On the other hand, should the instructions of the client be disregarded, and counsel proceed to act on his views and according to his own opinions, notwithstanding he may be under the honest impression that he would best promote the interests of his client by such a course, if loss occurs he is both morally and legally liable therefor. In all cases counsel should advise his client to the best of his judgment, but if the client, as is not infrequently the case, refuses to follow the advice, it is safer for counsel to follow the client's directions.[54]

250. SERVICES OF FIRM. It has been judicially held that the several members of a law firm constitute but one person in law, and that the act of one, in the partnership business, is the act of all.[55] Hence it would seem that while a client is entitled to the personal services of the attorney he retains, yet, if he retains a firm either member can perform the service; or, if assented to by the client, it may be performed, under their direction, by a person in their employ.[56]

251. DISABILITIES OF THE RELATION. As we have seen, the relation existing between attorney and client is essentially one of confidence and trust.

[54] Nave v. Baird, 12 Ind. 318.
[55] Green v. Milbank, 3 Abb. N. Cas. (N. Y.) 138.
[56] Eggleston v. Boardman, 37 Mich. 14.

To a large extent the interests and rights of the client pass under the guardianship and control of the attorney, and, for this reason, he is not only held to the highest degree of good faith in all his transactions with the client but is disabled from doing many things that he otherwise might. In a former part of this work[57] it was shown that, in contemplation of law, the client is very much under the influence of his attorney, and hence the conduct and acts of the latter are subject to close scrutiny. Thus, if the attorney bargains with the client, while the relation exists, and thereby secures an advantage, the law, in many instances, will attribute this result to the use made of his undue influence and will strip him of the advantage thus gained by setting the transaction aside.[58]

252. This is a wide departure from the rules which regulate the ordinary transactions of men in other walks of life. Usually courts will not inquire into contracts for the purpose of ascertaining whether they are beneficial or otherwise, but will permit parties to retain the fruits of their own wisdom, sagacity, or experience. But in the relation of attorney and client we find a reversal of many of the best settled rules of law with respect to contractual freedom and the application of a rule of rigid morality that practically precludes the attor-

[57] See Sec. 127, *ante*.

[58] Zeigler v. Hughes, 55 Ill. 288; Haight v. Moore, 37 N. Y. Sup. Ct. 161; McMahan v. Smith, 6 Heisk (Tenn.) 167.

ney from assuming any position toward the client other than that of a disinterested and judicious adviser.

253. It is better, therefore, so long as the relation exists, that the attorney refrain from any dealings with the client, and certainly from any dealings with respect to the subject-matter of the litigation, for while the transaction may be fair and honorable, and while the client may not, in fact, have been swayed by the relation, yet, in such cases, all presumptions are in favor of the client and against the propriety of the proceeding.

254. It is not contended that an attorney may not, under any circumstances, enter into business transactions with his client. But, as a general proposition, they should be avoided. The rule is well established that whenever a contract between attorney and client inures to the benefit or advantage of the attorney the court will not only scrutinize closely but will actually change the ordinary rules of evidence to arrive at a determination. In such cases a presumption of bad faith is raised, which the attorney is obliged to overcome, and the burden of proof is cast upon him to show, by extrinsic evidence, that all was fair and just; that the client acted understandingly and with a full knowledge of all the facts connected with the transaction and was properly advised upon the law relating thereto.[59]

[59] Whipple v. Barton, 63 N. H. 613; Tancre v. Reynolds, 35 Minn. 476.

255. PROFESSIONAL OPINIONS AND ADVICE. It goes without saying that when a lawyer is consulted, in his official capacity, his opinions should be sincere and his advice honest. Upon this point there can be no question. It is the experience of most lawyers, however, that clients do not always seek legal advice with the purest of motives, and not infrequently this is apparent to the attorney even though it be denied by the client. Now here there *is* room for question, and a very serious one. Our captious critics assert that a lawyer is always ready to sell his opinion for money. This we must admit; it is for this that we are lawyers. They further assert that it is immaterial to the lawyer whether the opinion is to be used for good or bad purposes. This also we must admit; the reasons therefor appearing further on. They go a step farther, and say if his fee is paid the lawyer has no compunctions in aiding and advising iniquity. To this we may enter an unqualified denial.

256. Let us examine this matter a little more closely. A client comes to his attorney for legal advice in respect of something that does not commend itself to the moral sense. May the attorney, after inviting the confidence of the client, refuse to advise him? No! decidedly, No! He might have refused to see him in the first instance, but, having admitted him and heard his plaint, his duty compels a response. He must advise him; he must advise him honestly. How shall this be done, and what,

under such circumstances, would be honest advice?

257. It has been said that when a lawyer is asked for his opinion upon a purely legal question his duty is discharged by stating the law as it is. But frequently the client seeks more. He desires advice not only with respect to present conditions but also concerning future conduct. What should be the attorney's attitude in such a case? Has he a right to sit as a judge of the moral quality of the client's actions? Surely, we must also answer this question in the negative. Therefore, if the client desires to know what course the law requires under particular circumstances, it is the duty of the legal adviser to explain it. But here his duty ends. He is under no obligation to further the unjust schemes of the client, and should refuse to become a party to them. It has been urged that the attorney, on such occasions, should take advantage of the opportunity to deliver to the client a moral lecture. The attorney should do nothing of the kind. He was consulted as a lawyer, not a moralist. His opinion was sought on a question of law, not morals, and the experience of the writer is that attempts of this kind on the part of the lawyer are generally hotly resented by the client. If he so desires he may show the client the iniquity of the scheme as a reason for declining to actively assist him, but this is enough.

258. ADVISING COMMISSION OF CRIME. Where counsel is applied to for advice with respect to any matter of legal cognizance he may state the law as

it is and the consequences that would follow its infraction, and, with respect to the facts of the particular case, may advise as to what may or may not be done. This is strictly within the sphere of professional duty, and the intent that may have prompted the inquiry on the part of the client is immaterial. But no lawyer has the right, in the discharge of professional duties, to involve his client by his advice in a violation of law; and he becomes implicated in his client's guilt, when, by following his advice, a crime against the laws of the state is committed. The fact that he acts in the capacity and under the privileges of counsel does not exonerate him from the well-founded legal principle which renders all persons who advise or direct the commission of crime guilty of the crime committed by compliance with the advice or in conformity with the direction which may be given.[60]

259. REFUSING A RETAINER. It is asserted by some writers that a lawyer is not at liberty to refuse his services to any person who may apply. This is one of the old medieval notions, which grew out of the organization of the early order of advocates. But this rule, if indeed it ever was a rule, has long been abrogated, so far, at least, as respects civil causes. Notwithstanding that counsel is an officer of the court, and may in a proper case be compelled to appear for a person arraigned at the bar of such court, yet his relation with the client is generally

[60] Goodenough v. Spencer, 46 How. Pr. (N. Y.) 347.

one of employment. This employment he is at liberty to refuse for any reason, or even for no reason, and there will occasionally be cases presented where the dictates of a sound morality will compel such refusal.

260. One of the accusations frequently brought against members of the bar is their alleged indifference to the moral aspects of the causes they advocate. Of course, much of this complaint is but hypocritical cant, drawn from the overwrought imaginations of the writers of distempered romances or the super-sensitive souls of pulpiteers, yet it must be admitted that individual cases do at times furnish a basis for such attacks. It were vain to deny that many men enter the legal profession with but faint ideas of its moral obligations, and of the relations which the lawyer sustains to society, and who traffic with the trust that has been confided to them. It is these tradesmen who have rendered possible the accusation of moral indifference. Therefore, it is a duty which every honorable practitioner owes to the bar, the court and society, to decline a case which, on its face, is unmistakably tainted with immorality or opposed to the known rules of public policy. Cases will sometimes be presented where counsel's legal discrimination will at once perceive its inherent vice. In such event there is but one honorable course to pursue, and that is to advise the client that his cause is unjust and refuse to advocate it.

261. But while the foregoing emphatically announces a rule for the abstract idea involved in a case presented for a lawyer's consideration, it must also be borne in mind that the lawyer's functions are administrative, not judicial, and it is because of a failure to make this distinction in the lay mind that much of the hostile criticism of the bar has arisen. Without in any way assailing the integrity of the rule just stated it may yet be said that in very rare instances will a lawyer be justified in refusing a retainer on moral grounds only. In nearly all disputed questions of fact it is impossible for him to ascertain the truth of the matter before he accepts a retainer. To do this it would be necessary to call all of the witnesses, sift their evidence, and anticipate every aspect the case might assume upon the hearing. Manifestly, this he cannot do, and notwithstanding that his first view of the case may predispose him against it yet in the end it may turn out to be an honest claim or a just defense.

262. CONDUCT OF CASES. The attorney, to employ a well-known legal metaphor, stands in the shoes of the client. Whatever the client in fairness might do, if conducting his own case, the attorney may do for him. This seems to be the one great underlying principle that shapes professional conduct. Now, in the application of this principle, from a strictly ethical point of view, the attorney must at times be a minister of hardship. But we must distinguish between hardship and injustice, for

while the law may, and often does, work a hardship, it never works injustice. Let us take the familiar example afforded by the operation of the statute of limitations. A owes B ten dollars. The justness of the debt is not disputed, and, from the moral standpoint, no time can bar such debt and no laches can impair the right to demand same. But the law, in the interests of society, has placed a limit on such right and denied a legal remedy to the creditor when that limit has been reached. The moral obligation exerts just as much force the day after the limit expired as it did the day before, and, *in foro conscientiae,* the debtor should discharge the debt. But if B neglects to sue for payment until after the statute has run, A may interpose the bar of the statute as a defense, and thus virtually cheat B out of the money. There can be but one opinion in the mind of any honest man with respect to a person who seeks to avoid the payment of a just debt on a plea of this character, but, it is a plea which the law permits; the client has a right to avail himself of it, and his attorney, "standing in his shoes," is under a duty to urge it in a suit brought to recover the debt.

263. It is the same with a number of other pleas. Thus, C, a young man twenty years of age, borrows from D ten dollars, which he spends in the pursuit of pleasure. Morally, C can never be absolved from the obligation of repayment, but as he was an infant at the time the loan was made, and

the money was not procured for necessaries, the law permits him to repudiate the debt when sued for same after attaining his majority. This is called the plea of infancy, or, as generally known among the lawyers, the "baby act." Now, however much the attorney may despise a client who seeks to take advantage of his infancy to defeat an honest debt, it is not for him to advance his own ideas of personal duty. This is a plea which the law allows; it may, therefore, in fairness be pleaded by the client, and the attorney is bound to interpose it when retained to defend. In all matters of this kind the attorney has no discretion. Any defense which the law affords to a party, any shield which it extends to him, any excuse which it may furnish, must be used by his attorney in his interest, and however improper such use may seem to the moralist, if the law sanctions it no blame can rest on the attorney for the results that may flow from it.

264. It may happen that either before or upon the trial the attorney discovers that his client has no cause of action or ground of defense. In such event the client should be informed of the defect at the earliest opportunity, that he may take steps for a compromise or other termination of the suit. An attorney is guilty of gross unprofessional conduct when he advises or permits a client to pursue litigation that can only end in defeat with its attendant costs and expenses, and one who designedly adopts such a course, merely for the fee which same

may bring, is deserving of the severest censure. If the cause cannot be compromised, or if, with knowledge of the facts, the client insists upon a trial, the attorney performs his whole duty, if for the defendant, by scrutinizing the plaintiff's proofs and urging their defects, while if he appears for the plaintiff he can in honor do nothing more than present the case in the true aspect in which he has discerned it and meet defeat.

265. REPRESENTING BOTH SIDES. There is an implied obligation in every employment that the employee shall be faithful to his employer and will do nothing that may militate against his best interests. This obligation is nowhere so sharply accentuated as in the relation of attorney and client, and because of the peculiar personal quality which characterizes this relation it necessarily follows that the attorney may not assume to represent any person or party whose interests are in any way inimical to those of the client who first retained him.

266. It may often happen, where the interests are the same, that an attorney may with propriety represent a number of persons, for, notwithstanding that their interests are separate, the cause of one may yet be the cause of all. This is often seen in the case of suits by or against heirs. Again, he may properly represent a number who are not united in interest, provided they do not occupy antagonistic positions with respect to each other. Indeed, the mutual convenience of such parties will

often suggest such a course, as in the case of a number of creditors who seek to discover the concealed effects of a bankrupt debtor. But this would seem to be the limit. It is immaterial that parties may all have a common cause against a common adversary if they also claim rights which, if enforced, will militate against each other. In such event the duty of counsel is clear, and if he has accepted a retainer from one, then, in justice to himself as well as his client, he should decline that of the others. This course may at times entail a pecuniary hardship to the attorney, but it seems to be the only one that can be safely followed.

267. But, while the general integrity of the rule is beyond question it is not without some qualification in its practical application, and notwithstanding the interests may be adverse yet if they are to be amicably adjusted there may be no impropriety in having each side represented by the same counsel. The cases in which this may be done, however, are exceptional and never entirely free from conflicting duties. Thus, in matters of mortgage or similar security, it is not uncommon for the same counsel to represent both borrower and lender, upon a mutual understanding of the parties to that effect,[61] and the same may be true in matters connected with the purchase and sale of land or other marketable commodities.[62] A familiar example is also furnished

[61] Lawall v. Groman, 180 Pa. St. 532.

[62] Cooper v. Hamilton, 52 Ill. 119.

in cases where an attorney employed to collect a note is appointed by the debtor his attorney in fact to confess judgment on the same note. In such a case, notwithstanding the apparent adverse positions, it would seem that the exercise of the power by the attorney is not inconsistent with fair dealing, nor an unprofessional employment of the functions of his office.[63]

268. A still further example may be found where, in litigated cases, the proceedings, though adverse in form, are yet amicable and consistent in fact. This is illustrated where a number of heirs resort to the aid of a court for a judicial partition of lands. As, in such a case, there are no adverse interests in fact, there would be no impropriety in having all of the heirs represented by the same counsel.[64] But these are the exceptional cases. In the main the rule holds good, and no self-respecting and conscientious attorney will ever allow his personal interests to overcome his sense of professional honor by taking a fee from both sides of a case.

269. In a case where both parties are his clients and where the professional relation has induced confidential disclosures, it would seem that the only position the attorney can consistently take is that of

[63] Wassel v. Reardon, 11 Ark. 705.

[64] In practice there would, of course, be a technical difficulty, as no court will permit an attorney to appear of record for both plaintiff and defendant. The defendants, therefore, would have to appear by nominal attorneys, or, as is frequently the case, suffer the bill to be taken as confessed.

strict neutrality. He cannot, with propriety, act for either, and should decline to appear in the case. About the only office he may fill in such a juncture is that of mediator, to effect, if possible, a conciliation, but even this office should be accepted with the greatest reluctance and abandoned as soon as it is evident such conciliation cannot be effected. Otherwise his conflicting duties will render it impossible for him to properly represent either, and should he attempt so to do he subjects himself to a withdrawal of the confidence of both.

270. PRIVILEGED COMMUNICATIONS. It has long been a rule of the common law that matters coming within the ordinary scope of professional employment, and which are known to the attorney only through his official relation, are not subjects of judicial inquiry. These matters are technically known as *privileged communications.*

271. This rule was not made on account of any special importance which the law attributes to the business of legal practitioners, nor with a design to afford them protection, but, as it is impossible to properly conduct the business of courts without the aid of men skilled in those matters affecting rights and duties which form the subject of judicial proceedings, if communications made to them were not protected no one would dare to consult a legal adviser nor could any one safely come into court if he should have sought such advice. Therefore, as it is of the utmost importance that suitors should

be permitted to avail themselves of the skill and learning of those whom the law has designated as its ministers, and as it is necessary to the ascertainment and maintenance of their rights that confidential disclosures should be made to the legal adviser to enable him to properly perform the duties of his office, so the law has considered it the wisest policy to encourage and sustain this confidence by requiring that as to such facts the mouth of the attorney shall be forever sealed.[65]

272. The rule extends to all communications by a client to his counsel, for purposes of professional advice or assistance, whether such advice or aid relates to a suit pending or contemplated, or any other proper matter for professional assistance. When it applies it is perpetual, and the communications may not be revealed at any time, nor in any action or proceeding between other persons, nor after the relation of attorney and client has been terminated.[66] It is a privilege of the client, and never ceases unless voluntarily waived by him. Not only will courts never compel an attorney to disclose facts communicated to him in his professional capacity but, as a rule, they will not permit him so to do,[67] and it has been held that one who disregards his duty in

[65] Hemenway v. Smith, 28 Vt. 701; Bigler v. Reyher, 43 Ind. 112; Barnes v. Harris, 7 Cush. (Mass.) 576; People v. Barker, 56 Ill. 299. The rule has further been confirmed by statutory enactments in most of the states.

[66] Re Boone, 83 Fed. Rep. 944.

[67] People v. Atkinson, 40 Cal. 284.

this particular commits an offense that justifies his exclusion from the bar.[68]

273. It necessarily follows that, where confidential communications are so rigorously guarded that courts will not permit them to be divulged in the interests of justice, the attorney is wholly without legal or moral right to give them a private publication. Indeed, we can hardly imagine a person, clothed with the responsible character of a lawyer, so dead to all sense of honor as to voluntarily disclose the affairs of his client committed to him under the seal of professional secrecy. In case an attorney should so disregard the proprieties as to wantonly or maliciously betray his client's trust in this respect, he must be considered as having forfeited his right to his office and should be promptly and forever disbarred.

274. In the application of the rule courts have usually accorded it a liberal construction with a view to maintaining its integrity, and it has been held that it is broad enough to embrace a case where the one seeking counsel pays no fee, and where he employs other counsel in the prosecution of the business, and even where the lawyer consulted is afterward employed on the other side. It is contended in support of these positions that limitations of the rule, if allowed, might be unknown to laymen; and if they cannot feel perfect freedom in all cases then,

[68] People v. Barker, 56 Ill. 299; Re Boone, 83 Fed. Rep. 944.

instead of the implicit confidence that should exist, the intercourse might be restrained by fear and marred by dissimulation on the part of the client, and thus the object of the rule be defeated.

275. To the general rule, as above stated, there are a few exceptions growing out of peculiar circumstances. Thus, where the communications have reference to an unlawful purpose, such as the commission of crime,[69] they are not privileged. In such event they are treated as being in the nature of conspiracies, and therefore subject to be inquired into.[70] Again, where an attorney has acted for two clients, it seems his communications with them are not privileged in subsequent suits between them or their representatives.[71] So, too, where the communications are made in the presence of all the parties to the controversy, they are not privileged, and may be treated in the same manner as any other competent evidence.[72] But this is practically the full limit of the exceptions, and where the matter in

[69] Thus, where a person who was on trial for murder had previously consulted an attorney for the purpose of ascertaining what the law was if he should kill deceased, from whom he had received great provocation, it was held that the communication between defendant and the attorney was not privileged. Orman v. State, 22 Tex. App. 604, and see, People v. Mahon, 1 Utah, 205; State v. McChesney, 16 Mo. App. 259.

[70] People v. Van Alstine, 57 Mich. 69.

[71] Sherman v. Scott, 27 Hun. (N. Y.) 331; Gulick v. Gulick, 39 N. J. Eq. 516; Goodwin's appeal, 117 Pa. St. 514.

[72] Britton v. Lorenz, 45 N. Y. 51.

question does not come fairly within them, any acts done, or words spoken by a client in the presence of his attorney and in the scope of his employment are privileged,[73] as are all advice given or opinions stated by the attorney.[74]

276. The rule of privileged communications extends its protecting influence over parties only where the relation of attorney and client exists.[75] Hence, where an attorney is consulted merely as a friend, or in a casual way, and where neither he nor the person consulting him, supposes the relation to exist, the communications are manifestly not entitled to the sanction of secrecy extended to communications received in a professional capacity.[76] In such event the attorney may be compelled to testify if called upon, and the matter of privately divulging such communications is to be governed by the same considerations that would influence the attorney to state or withhold any other information he might possess.

277. ADVERSE EMPLOYMENT. While the rule is imperative that an attorney may not accept an adverse retainer during the continuance of a professional relation, nor assume a position hostile to his client and inimical to the interest he has been engaged to protect,[77] it follows, on principle, that

[73] Kaut v. Kessler, 114 Pa. St. 603.

[74] Lengsfield v. Richardson, 52 Miss. 443.

[75] Romberg v. Hughes, 18 Neb. 579.

[76] Goltra v. Wolcott, 14 Ill. 89; 1 Greenl. Ev. § 244.

[77] Fairfield Bar v. Taylor, 60 Conn. 11; Arrington v. Arrington, 116 N. C. 170.

he may not, after the relation has ceased, seek or accept an employment in opposition to his former client for the purpose of using against him information confidentially gained while the relation subsisted.[78] Such an act involves not only a high degree of moral turpitude but is a positive breach of the attorney's oath, as well as a violation of the well-established rule relating to privileged communication. For such a willful disregard of professional obligations it would be the duty of a court to disbar the offender whenever the matter was brought to its attention and a proper case made out.[79]

278. WITHDRAWAL FROM CASE. The undertaking of an attorney retained to conduct or defend a suit is usually regarded as an entire and continuing contract to remain in the case until its termination.[80] There are many reasons why this should be so, and the reasons are obvious. Hence an attorney acts in bad faith if, without justifiable cause, he abandons the suit, and particularly is this true where he withdraws without giving his client ample notice and a full opportunity to procure other counsel.[81]

[78] Re Boone, 83 Fed. Rep. 944; Hatch v. Fogarty, 10 Abb. Pr. (N. Y.) 147.

[79] Re Boone, 83 Fed. Rep. 944; and see, Parker v. Parker, 99, Ala. 239; Spinks v. Davis, 32 Miss. 154; Valentine v. Stewart, 15 Cal. 387.

[80] 2 Greenl. Ev. sec. 142; Cairo etc. R. R. Co. v. Koerner, 3 Ill. App. 248.

[81] Nichells v. Nichells, 5 N. Dak. 125; Tenney v. Berger, 93 N. Y. 524.

279. But while the law implies the obligation of continuous service, and will impute bad faith in its breach, an attorney may, at any proper stage of the proceeding, demand his fees already earned, and if same are not paid he may, after giving reasonable notice, withdraw from the case.[82] There is no distinction, in principle, between the relation of attorney and client and any other form of agency. It is essentially a contract of employment involving the reciprocal obligations of service on the one hand and compensation on the other. In the absence of a special contract there is no good reason, either in law or morals, for deferring such compensation until the final determination of the action, and the attorney may, with undoubted propriety, demand such sums as his services already rendered are reasonably worth. A non-compliance with such demand will constitute a just cause for declining to further serve.

280. The intent of the rule seems to be that an attorney may not capriciously or maliciously withdraw, and notwithstanding that there may be unpaid claims for other services, rendered in other and different matters, or even if they arose during the progress of the suit, but not out of it, this would not furnish a cause for abandonment.

281. But, while counsel may not summarily withdraw from a case from motives above indicated, there may yet be occasions when it becomes a duty

[82] Cairo etc. R. R. Co. v. Koerner, 3 Ill. App. 248.

so to do and when to continue would constitute a more flagrant breach of morals than to retire. A lawyer is under no obligation to advocate iniquity. He may know, or at least feel, that he will be successful in the issue; the circumstances may be such as to inspire confidence in the result; but unless he also believes that the cause is just he does violence to every principle of advocacy by maintaining it. He has a right to take all the advantage his learning and talents afford him in order to sustain a good cause or defeat a bad one, but he has no privilege to substitute his talents or learning for the honesty of a case and thereby render iniquity triumphant. Therefore, if during the progress of a suit it becomes apparent that it is unsound or dishonest, he is justified in refusing longer to continue in it.[83] Yet this is a right that should be exercised with care and prudence. It may be that, without knowledge of its inherent vice, he has advanced so far in the cause that he cannot abandon it without seriously compromising the interests of his client. In such event, if professional good faith may seem to demand it, he should remain, but he must do no more than such professional good faith requires. While he is not morally responsible for either the acts or motives of his client in maintaining an unjust cause, he is responsible for his own acts if he adopts its principles, argues from premises that have not been proved, urges presumptions which,

[83] Brown's, Forum, Vol. 2, p. 31.

although consistent with the evidence submitted, are yet inconsistent with the actual facts, or maintains affirmations which he knows or has reason to believe are false.

282. An attorney may also be justified in withdrawing from a pending case for reasons which affect only himself. Thus, if his client insists upon associating with him another attorney with whom he objects to have personal or professional relations, or with whom he cannot cordially co-operate, he may decline to proceed farther with the case and will be entitled to compensation for services rendered up to the time of such withdrawal.[84]

283. WITHDRAWING APPEARANCE OR PLEADINGS. If a withdrawal from a case and a refusal to longer represent the client, except for good cause, involves the element of bad faith, then, with stronger reason, may we not say that a withdrawal of appearance amounts to an act of moral turpitude which merits an exercise of the disciplinary power of the court in respect to the offender. An attorney who has entered an appearance for a suitor has a wide range of authority and discretion in respect to all matters relating to the suit, and may, under proper circumstances and with honest motive, withdraw any paper or pleading that may have been filed, even his own appearance, notwithstanding that the effect may be to place the client in default.[85]

[84] Tenney v. Berger, 93 N. Y. 524.

[85] Chicago Building Society v. Haas, 111 Ill. 176.

In like manner he may dismiss his client's suit without any special authority.[86] But where an appearance has once been properly entered, where pleadings have been filed, or an issue made up, the attorney may not, from mere caprice or vindictive motives, withdraw such pleadings or appearance, and should he do so the act may be regarded as a breach of faith, indefensible in morals and illegal in law.[87]

284. The principle of confidence, which lies at the foundation of the relation of attorney and client imperatively forbids the attorney, so long as that relation exists, from doing any act which is inspired by malice or hostility to the client or his cause, the effect of which is necessarily injurious to the matter intrusted to his care.[88]

285. So, too, an attorney, when acting in good faith and without objection from his client, may waive or withdraw a defense and consent to judgment, but he has no power fraudulently to barter away any of his client's rights or dispose of any of his interests to the opposite party.[89] Should he attempt to do so, then, upon a showing of the fact, it would become the duty of the court to protect

[86] Davis v. Hall, 90 Mo. 659; Simpson v. Brown, 1 Wash. 247.

[87] Nichells v. Nichells, 5 N. Dak. 125.

[88] Howe v. Lawrence, 22 N. J. L. 99; Ohlquist v. Farwell, 71 Iowa, 231; Haverty v. Haverty, 35 Kan. 438; Tenney v. Berger, 93 N. Y. 524.

[89] Chicago Building Society v. Haas, 111 Ill. 176.

the client from the treachery of his attorney and discipline the offender.[90]

286. INCONSISTENT POSITIONS. It is among charges sometimes brought against the profession, that the lawyer's occupation renders him unstable in matters of opinion, and that, by reason of the inconsistent positions he is frequently called upon to occupy, his statements are not always to be relied upon. This charge is not wholly without foundation, and has been rendered possible by a reckless and uncalled for offering of private opinion, with respect to their clients and the merits of their causes, on the part of many practitioners. There is, perhaps, no more impropriety in the expression of opinion by an attorney, with respect to causes pending in the courts, than by the laity. But, in his own causes at least, he is not employed to give voice to his own opinions, nor can his client claim this as a professional duty. He fully discharges every professional obligation by presenting his client's case to the best advantage and to the best of his ability. Beyond this he cannot safely proceed, and should he assume so to do unforeseen circumstances may often place him in embarrassing positions.[91]

[90] Re Boone, 83 Fed. Rep. 944.

[91] As an illustration of the statement of the text, the following excerpt from the *N. Y. World,* is pertinent:

"As a lawyer, Mr. S., of Kansas, defended a negro murderer, and after his sentence wrote to the Governor a strong indorsement of the negro's application for a pardon. Now,

287. The mere fact, however, that an attorney at a former time, and while engaged in professional employment, held a different view of the law of the case from that afterwards advocated by him, does not, of itself, disqualify him from accepting a retainer or affect his service.[92] It must often happen, in the course of an active practice, that an attorney will be called upon to urge views he has at some time combated. Of course, this will be condemned by the pseudo-moralist as being simply an attempt to prove that black is white, or white is black, according as he is paid. But if this were not so, much of the usefulness of the advocate would be eliminated. Besides, a lawyer has the same right to alter his opinions as any other person.

288. MONEY LOST IN HANDS OF ATTORNEY. In the course of professional employment a large amount of money, belonging to clients, must necessarily pass through an attorney's hands. Not infrequently, through no fault of his, sums are lost while still in his nominal or actual custody. A question is raised, in such a case, with respect both

as Gov. S. of Kansas, he has had to pass upon a new application for his old client's pardon, and his own letter, written as a lawyer, has been laid before him.

"But he refuses to grant the pardon and says that as Governor it is his right and duty to view the matter 'in an entirely different light.'

"This raises the very interesting though by no means new question: In the code of legal ethics what does a client's fee buy and what does it leave unbought?"

[92] Smith v. Ry. Co. 60 Iowa, 515.

to the moral and legal liability of the attorney to reimburse his client for the loss. The receipt of money by an attorney, in the prosecution of his employment, does not, as a rule, create the relation of debtor and creditor between him and his client. The money collected belongs to the client and the attorney is regarded as a trustee. The money, then, would be a trust fund, and its payment, preservation or loss, would be governed by the same rules that obtain generally in cases of trust. If the attorney exercises the same caution with respect to his client's money that a prudent man would display in respect of his own money, and a loss happens, he will be excused.[93] In such event there is neither a legal nor a moral obligation to indemnify the client for the loss.

289. Now in these days of commercial activity but few men, even the most prudent, retain their money in their own custody but commit its care to others, both for the feeling of security which such committal engenders and the facility with which it may be transferred or paid out by means of checks. Whatever else the lawyer's "strong box" may contain it rarely is made a receptacle for money. But while a deposit of money in a bank having a good standing is a distinctly prudent act, it must yet be remembered that the client's money is a trust, and hence, while there may be no impropriety in depositing same in the attorney's general

[93] Norwood v. Harness, 98 Ind. 134.

account, there is a danger. If the attorney, for his personal convenience, or from whatever motive, deposits his client's money in his own name, thereby vesting himself with a legal title to same, it follows, as a necessary consequence, when a loss occurs, that he will not be permitted to say, as against his client, that the fact was not as he has voluntarily made it appear. The loss must be borne by himself.[94] On the other hand, if a deposit is made in such a manner as to preserve its trust character on the books of the bank, the loss, if any occurs, falls upon the client.[95]

290. MONEY RETAINED BY ATTORNEY. Much of the time, labor, and skill of attorneys, is devoted to the recovery of money belonging to or claimed by their clients. In most cases the money so recovered is collected by the attorney, whose duty it is, after deducting his own reasonable charges and expenses, to promptly pay the same over to the client. In a number of states this duty is further emphasized by a mandatory statute, and a refusal or neglect so to pay, after demand made, subjects the attorney to disbarment.[96]

291. In case of willful misappropriation by the

[94] Gilbert v. Welsch, 75 Ind. 557; Williams v. Williams, 55 Wis. 300; Norris v. Hero, 22 La. An. 605.

[95] Norwood v. Harness, 98 Ind. 134. Hence, it is well to keep at least two accounts; one as an individual and one as a trustee.

[96] See, Re Treadwell, 67 Cal. 353; Re Temple, 33 Minn. 343; People v. Ryalls, 8 Colo. 332.

attorney no question can arise and he occupies no better position than any other thief. This is not a matter of ethics, but of criminal law, and therefore we may pass it without further notice. But the attorney may abuse the relation created by his employment in many ways short of felonious withholding of funds. Mere neglect, inattention, temporary use of funds by him, vexatious and unreasonable demands with respect to same, may all tend to disclose conditions that can not exist with that good faith, integrity and honor that should characterize the attorney's transactions with his client. Hence, irrespective of any criminal intent, where it is shown that an attorney has failed to pay over money on demand, and after a tender of his reasonable fees, or where he has postponed the just claims of his client, or by evasions of the demand has forced him to expense and litigation, this may be considered such mal-conduct as would justify a court in striking the name of the offender from the rolls.[97]

292. RIGHT OF CLIENT TO DISCHARGE HIS COUNSEL. While an attorney who has accepted a retainer is not at liberty to sever the relation, except for cause, it would seem the client is not so bound. Upon this point the courts are generally agreed. It would further seem, that a client may discharge his attorney at any time, with or without cause, even where the case has been taken on

[97] People v. Palmer, 61 Ill. 255.

a contingent fee. If the discharge is without cause the attorney may recover for services already performed on a *quantum meruit,* and if no service has been rendered no action will lie. If the discharge is for cause, then, in most cases, the attorney forfeits his fee.[98]

293. While there would certainly seem to be an element of hardship in the rule, it seems to be sustained on the ground that the relationship is so peculiarly one of confidence that it would be unjust to require a party to continue in his service one whom he distrusts, or on whose skill and ability he no longer relies, or to permit an attorney, under such circumstances, to continue a relationship where the lack of confidence would seriously impair his efficiency and interfere with his ability to serve both client and court in the manner his office requires.[99]

[98] See, Moore v. Robinson, 92 Ill. 491; Duke v. Harper, 8 Mo. App. 296; Quint v. Mining Co. 4 Nev. 304; Scobey v. Ross, 5 Ind. 445.

[99] Henry v. Vance, 63 S. W. Rep. (Ky.) 273.

CHAPTER IX.

RELATIONS WITH COURT.

Nature of the judicial office—Conduct in court—Conduct out of court — Influencing judges — Criticism of judges—Deceiving the court—Misstating law or facts.

294. THE JUDICIAL OFFICE. In every controverted question there must be a resort to final authority of some kind if the question is to be closed. In an earlier and ruder age the appeal was to arms, and force was the final arbiter. Happily, the world has passed this stage of development and now the appeal is to reason. But opposing minds may not overcome in the same manner as brute force and, therefore, a third mind is necessary to intervene between them. It is upon this theory that courts have been established and justice is administered. This third mind we call the judge.

295. A man called to fill the honorable station of a judge should possess unbounded learning with intellectual powers of the highest order. It not infrequently happens that the judge is both learned and wise, but none, not even the best, can properly and fully discharge the functions of his office without the aid of the bar. Occasionally some shallow-brained pretender, by a wave of fortunate chance, is cast upon the bench, and, gazing upon his own

distorted image reflected in the pellucid mirror of his mind, fancies he knows it all. But the great lawyer, the profound jurist, eagerly avails himself of the benefits derived from the research and reasoning of counsel, and gratefully acknowledges the assistance which they afford.

296. In the hurry and rush of modern life, and in view of the vast volume of litigation passing through the courts, it is essential to the due administration of justice that some persons shall act as aids and advisers to the court, presenting in turn each aspect of the case; investigating and applying the principles that should govern it; collating and explaining the authorities which bear upon it, and suggesting the distinctions and analogies which must be regarded in arriving at a decision. This is the province of counsel, and it is largely through the labors of counsel that judges are enabled to dispatch the business of the courts.

297. CONDUCT IN COURT. As previously shown, a lawyer is under obligation to do nothing that shall detract from the dignity of the court, of which he is himself a sworn officer and assistant. He should at all times pay deferential respect to the judge, and scrupulously observe the decorum of the court room.[2] The public takes its cue in this respect from the lawyers, and unless the members of the bar shall by their own example inspire those feelings of respect for courts and for judicial proceed-

[2] In re Pryor, 18 Kan. 72.

ings, which in a country like ours constitutes their greatest safeguard, it were idle to expect the public to be more considerate.

298. Nor is this merely a matter of good manners or formal etiquette. There is a deep underlying ethical principle as well. A court is a place wherein justice is judicially administered by the supreme power of the state. In England this power would be the king, and while it is, of course, impossible that the king should personally dispense the justice of the realm, yet, in contemplation of law, he is always present in his judges, whose power is only an emanation of the royal prerogative.[3] The judicial machinery of the United States is modeled after that of England, and while our political conditions are vastly different from those which prevail in England the theories involved in the administration of justice are the same. The sovereignty of the state is always present in every court established by law, and its visible representative is the judge. Whatever our opinion may be of the man, and however little he may be entitled to our respect for himself, we must yet respect the majesty of his office.

299. But, while a becoming respect for all who "sit in judgment" is strictly enjoined, both as a moral and a professional duty, a manly respect only is intended, not a servile obsequiousness. The dignity of the bench must be maintained, but so also must the independenec of the bar. The judge fills

[3] Black. Com. b. ii, p. 23 (Cooley's Ed.)

a most exalted office; he should be a most exalted man; but he is only a man in any event and not a being of superior mould. Occasions will arise when duty to the client and a proper regard for the interests committed to his charge, renders necessary a firm and decided opposition, on the part of the advocate, to the views expressed or the course pursued by the court. But this may and should be done in an open, manly way. The outward forms of respect for the court should be preserved, even though the judge may be unmindful of his own duty of respect to the bar.

300. CONDUCT OUT OF COURT. While it is comparatively easy to prescribe a line of conduct to be followed in court, it is correspondingly difficult to lay down rules for general observance by the bar, with respect to its attitude toward the bench, when out of court. Indeed, this is a matter upon which there can hardly be said to be a settled opinion, and many differing views have been presented. If the judge is a gentleman, then in the intercourse of private life he certainly should be accorded the civilities which obtain among gentlemen. Of necessity he must, to some extent, mingle with his brethren of the bar in a social way, and his judicial position usually exerts a decided influence on the manner in which he is received. But while a due courtesy may always be shown to a person occupying judicial station, it is yet contended that such courtesy has its limitations and that same may be pushed beyond the

bounds of sound ethical precept. Thus, it is said, marked attention and unusual hospitality to a judge, when the relations of the parties are such that they would not otherwise have been extended, subject both judge and attorney to hostile criticism and possible misconstruction of their acts, and hence, that same should be sedulously avoided.[4]

301. But this, while expressing a true sentiment, is very vague. The connection between the bench and bar is, and always has been, of the most intimate character. A judge loses none of his social instincts by assuming the ermine, and while his position is changed he is still a lawyer; and even though we admit that a self-respecting independence in the discharge of an attorney's duties, which at the same time does not withhold the courtesy and respect due the judge's station, is the only just foundation for cordial and official relations between bench and bar, yet it is not always easy to draw the line nor to say how far such cordial relations may extend. A palpable attempt to gain special personal consideration and favor of a judge is mean and contemptible, and the judge who seems to lend himself to such an attempt is deserving of no more respect than the attorney, but to say that an attorney may not extend, and a judge may not accept, the offices of fraternity, social kindness and hospitality is going too far.

302. It must be remembered, however, that a lawyer, like Cæsar's wife, must be above suspicion.

[4] See, Code Ala. Bar Assn. sec. 3.

Not only must he practice no evil but he must as well avoid the appearance of evil, and therefore in his social relations with the judge he must ever be circumspect and guarded. While this is a rule of conduct for all occasions it applies with increased force at times when his cases are pending.

302a. Thus far we have been considering our subject with special reference to the cordial relations that may subsist between bench and bar and the course of conduct to be pursued in such cases. There is, of course, another side, where the relation is that of enmity. As a rule, no question can arise with respect to conduct in court, even where the presiding judge may be an object of contempt or hatred. Respect for the judicial office must overcome personal dislike, and a formal courtesy, at least, must be shown. But how about conduct out of court? Certainly no one, lawyer or layman, is compelled to fraternize with those whom he detests. When off the bench the judge, in most things, is not distinguishable from other men, and an attorney commits no breach of decorum by ignoring him in a social way. But this is about the extent to which he may go. The obligation which an attorney assumes on being admitted to the bar is not discharged by merely observing the rules of courteous demeanor in open court, but includes abstaining out of court from all overt acts calculated to bring odium or reproach upon the profession or to lower the dignity of the bench. Therefore, while an at-

torney may refuse to extend social amenities to a judge he must not indulge in insulting language or other openly offensive conduct toward him for any of his judicial acts.[5]

303. INFLUENCING JUDGES. It is often said, that our present mode of selecting judges by popular election is conducive to bad results in the administration of justice. We will not discuss this matter, but every lawyer of long practice knows from his own experience that, too often, men who are proof against pecuniary bribes are yet susceptible to "influence." It is the duty of the bar to minimize this evil by its own conduct. It is gross impropriety for counsel to discuss his pending cases with the judge or to privately argue their merits, or to address to him private communications respecting his causes in court. It is equally reprehensible to permit the client so to do, or to secure the good offices of a "mutual friend," with a view to influence favorable action. An attorney who resorts to such indecent measures forfeits his right to be called an honorable practitioner, and a judge who listens to same is unworthy of his high office.

304. CRITICISM OF JUDGES. It is by no means uncommon for lawyers to discuss, criticise and even condemn, the acts and decisions of the courts, and

[5] Thus, a threat of personal chastisement, made by an attorney to a judge out of court for his conduct or rulings during the trial of a cause pending, is strictly unprofessional and furnishes grounds for disbarment. Bradley v. Fisher, 13 Wall (U. S.) 335.

sometimes to unfavorably comment on the personal and official character of the judges. A question, therefore, arises as to whether conduct of this kind will constitute such misbehavior as to violate the spirit, if not the letter, of the attorney's oath of office. As previously remarked, it has become a maxim of legal ethics that an attorney is required to maintain at all times the respect due to courts of justice and judicial officers. This is not only the received doctrine of the common law but has also found expression in statutory enactments relating to professional duty, and its observance is enjoined on all who assume to discharge the functions of an advocate. But it must further be remembered that a person does not forfeit his constitutional rights as a freeman by becoming an attorney,[6] and that free speech is as much secured to a lawyer as to any other member of the community. To what extent, then, may an attorney criticise the private character or official acts of the judges of the courts of which he is a member?

305. It is conceded that in matters collateral to official duty the judge is on a level with the members of the bar as he is with his fellow citizens, his title to distinction and respect resting on no other foundation than his virtues and qualities as a man.[7] It is the right of every citizen to scrutinize the character and conduct of men acting in public ca-

[6] Ex parte Steinman, 95 Pa. St. 220.

[7] Case of Austin, 5 Rawle (Pa.) 191.

pacities. An attorney in this respect is not distinguishable from other men. Indeed, it would seem that it is not only the right but the duty of a lawyer, to bring to the notice of the people, who elect the judges, every instance of what he believes to be corruption or unfitness for office. "No class of the community," says Sharswood, C. J., "ought to be allowed freer scope in the expression of opinion as to the capacity, impartiality or integrity of judges than members of the bar. They have the best opportunities of observing and forming a correct judgment, and to say that an attorney can only act or speak on this subject under liability to be called to account by the very judges whom he may consider it his duty to attack and expose, is a proposition too monstrous to be entertained for a moment under our present system."[8] In such event it would seem the attorney does not act professionally but as a citizen, and is responsible for what he may say only in that capacity.

306. There is another form of criticism more frequently indulged in, and usually with entire propriety. This occurs where courts have rendered decisions involving questions of law. It is conceded that attorneys may freely criticise all such opinions, both in and out of court, at the time the decision is rendered and ever afterward, without violating any

[8] Ex parte Steinman, 95 Pa. St. 220; and see, State v. Anderson, 40 Iowa, 207.

of our ethical canons or subjecting themselves to discipline.

307. There is still another form of criticism, often resorted to but of questionable propriety. It is said to be an ancient rule of the *lex non scripta* that every defeated litigant, as well as his counsel, may freely "cuss" the court, and there are few who fail to avail themselves of this privilege. There may be occasions when criticism of this kind seems justifiable, but in many cases it is a mere subterfuge, designed to quiet the client and his friends or to cover some neglect, oversight, or inefficiency of the attorney. Its effect is always bad, and it should be avoided as far as the frailty of poor human nature will admit.

308. It would seem, then, that a lawyer may criticise both the personal and official character of the judge as well as his acts and decisions, but he has no right to slander either. Notwithstanding the lawyer's civil rights he is still bound to pay proper respect and exhibit a proper deference to the judges both in and out of court,[9] and even though we admit that judges should assist the bar in this particular, by being themselves respectable, there are yet many acts which fall without the line of professional functions by which professional fidelity may be violated. It must further be remembered that the proprieties of the judicial station in great measure disable a

[9]In re Brown, 3 Wyo. 121; Bradley v. Fisher, 13 Wall. (U. S.) 335.

judge from defending himself against strictures upon his official conduct, and for this reason, and because such criticisms tend to impair public confidence in the administration of justice, it is said that attorneys should, as a rule, refrain from published criticism of judicial conduct, especially in reference to causes in which they have been of counsel, otherwise than in courts of review, or when the conduct of a judge is necessarily involved in determining his removal from or continuance in office.[10]

309. DECEIVING THE COURT. It has ever been deemed gross unprofessional conduct on the part of an attorney, to attempt to pollute the administration of justice by a resort to any form of device for the purpose of preventing the decision of a cause upon its merits or of influencing the court to render a decision which it would not otherwise have made. This will include every species of deception practiced upon the court, either active or passive, whether by statements made by counsel or by others in his presence, or by testimony known to be false or forged. An attorney owes to his client a duty of fidelity but he owes the same duty to the court; and it is a part of that duty to correctly inform the court upon the law and the facts of the case that it may arrive at correct conclusions and render exact justice. He violates his oath of office when he resorts to deception, or permits his client to do so,

[10] Code, Ala. Bar Assn.

and by such acts forfeits his rights as an attorney.[11]

310. MISSTATEMENTS OF LAW OR FACT. It is one of the ancient duties of counsel to advise the court with respect to the law of the particular case in which he appears. Not only is he presumed to be well informed in the law generally, but with respect to such as applies to the particular case to have made a special study. The benefit of this study he imparts to the court for its guidance in arriving at a proper determination of the issues involved. In the discharge of this duty counsel is required to exercise the utmost candor and fairness and to avoid everything that may savor of deception. He must state the law as it appears, but he has a right to place such construction thereon as shall best subserve the interests of his client. Indeed, his duty to his client requires this course. He is under no obligation to present, or comment upon, those phases of the law that may seem to militate against his client's cause, and he may combat the application of such adverse law, whether advanced by the court or opposing counsel. These rights are clear and of universal recognition in all courts of justice.

311. But counsel perpetrates a gross fraud upon the court when he knowingly cites as authority an overruled case, or treats as if still in force a repealed statute. Fortunately instances of this kind are not

[11] People v. Beattie, 137 Ill. 553; In re Henderson, 88 Tenn. 531; Baker v. State, 90 Ga. 153; Ex parte Walls, 64 Ind. 461; In re Gale, 75 N. Y. 526.

of frequent occurrence, and generally where such "authorities" are presented it is due either to ignorance or carelessness. But ignorance and carelessness are scarcely less culpable than willful deception, and are almost equally reprehensible as professional traits.

312. An even more flagrant dereliction is presented when counsel garbles, distorts or knowingly misquotes the language of a statute, decision or text-book, and this offense is by no means uncommon. An attorney who stoops to such low artifices not only deserves the severest censure but is positively unworthy to mingle with honest men in the practice of law. A similar infraction of the ethical code occurs where counsel knowingly misquotes the contents of a document, the testimony of a witness or the language or argument of opposing counsel. No honorable attorney will ever be guilty of the foregoing or kindred deceitful practices, and persons resorting to same should be subjected to discipline.

CHAPTER X.

RELATIONS WITH THE BAR.

Character of the relation—Professional courtesy—Respect for age—Observance of agreements—Services for attorneys — Interference — Substitution of attorneys—Conclusion.

313. CHARACTER OF THE RELATION. In a former part of this book the writer endeavored to show a few of the salient features that marked the inauguration of the order of advocates in England, and to point out some of the distinguishing characteristics of same. From these it will readily be perceived that the advocates were not simply members of a learned profession but of a distinct order of society, established by civil authority, constituting a fraternity with settled rules and usages. In the flow of time and the changing conditions of society many of the ancient characteristics have been lost, but this essential idea has remained intact and the bar is still known, both among its own members and the public, as the "legal fraternity." It follows, therefore, that the relations subsisting between the members of the bar are, or should be, those of amity, good will, and mutual esteem. Notwithstanding that they are often arrayed against each other as champions of opposing forces, their intercourse

should yet be friendly, and, as partakers in a common enterprise, the honor and reputation of every member should be the cause of all.

314. PROFESSIONAL COURTESY. The professional relation which attorneys sustain toward each other in all matters of litigation is distinctly antagonistic. Indeed, it could not well be otherwise save in exceptional cases. They represent diverse and opposing interests, and their duties to their respective clients require an entire devotion to the cause in which they are retained. To the maintenance of such cause they are expected to contribute every exertion of skill and ability, and nothing, as a rule, can absolve them from the fearless discharge of this duty.

315. But it does not follow that because of this duty there should be that total disregard of the amenities of life which so often characterizes opposing forces. It is the clients, not the attorneys, who are the litigants; and whatever may the ill-feeling existing between clients, it is unprofessional for the attorneys to partake of it, or to manifest in their conduct and demeanor to each other or to the suitors on the opposite side, any of the rancor or bitterness of the parties. The ordinary civilities should always be studiously observed, and, in every instance, the utmost courtesy consistent with duty should be extended to an honorable opponent.

316. Aside from the conventional rules that regulate the conduct of gentlemen between themselves,

there are other matters which arise out of the professional character and are peculiar to the attorney's office. These we may classify under the general head "professional courtesy." There are no rules, however, by which the majority of these matters can be determined, nor even a settled observance. They are allowed, in the main, to rest in individual discretion, for the exercise of which the attorney is not required to account. This will include all incidental matters pending trial, not affecting the merits of the cause or working substantial prejudice to the rights of the client, such as forcing the opposite attorney to trial when he is under affliction; forcing trial on a particular day to the serious injury of opposing counsel, when no harm would result from setting the trial for a different time; extending the time for pleading, for signing a bill of exceptions, and the like. In all these matters it is customary to grant the favor sought as a professional courtesy, but no ethical obligation requires it, and in the few cases where bar associations have ventured to express an opinion it has generally been left in the discretion of counsel, and of the propriety or impropriety of the transaction he is allowed to be the sole judge.

317. It has been said that no client has a right to demand that his attorney be illiberal in such matters, and that an attorney is not required to do anything in respect to same that is repugnant to his own sense of honor and propriety, and if such

course is insisted on that counsel should retire from the case.[12] But this, in the opinion of the writer, does not state the true rule, and certainly does not represent the general practice. It is a client's right to have his cause tried at the time set, to have adverse pleadings filed within the time allowed, and to insist that his attorney shall take every legal advantage the case may afford, and this duty an attorney may not capriciously avoid nor is he at liberty to withdraw from the case merely because his client insists upon the strict observance of his rights. Whatever the feelings of counsel may be toward the counsel for the other side, and however much he may desire to accommodate him in matters of practice, he is yet under a paramount duty to follow his client's instructions in all matters pertaining to the legitimate conduct of the litigation.

318. Respect for age. A true lawyer is always a gentleman. A gentleman always exhibits a proper respect for age, and nothing, perhaps, more surely indicates good breeding. "No young man," says one writer, "can prosper in his profession who is unmindful of due respect to his seniors at the bar. He that is so breaks down his own safety and dignity, should he live to be old; in respecting them he respects himself. Flippancy, frowardness, exhibited by the youthful toward the aged barrister, is a mark of vulgarity, which must ever disgust those whose good opinion and support are worth preserv-

[12] Code, Ala. Bar Assn. sec. 30.

ing. We speak now not of comparative talents but simply of years, or stages in life."[13] The foregoing excerpt is commended to the thoughtful consideration of every young practitioner. This is an age of aggressive self-assertion, and American youth are educated upon these lines. I would not for a moment repress a laudable ambition that urges on the young advocate to forensic honors and triumphs, and will heartily join in the applause that greets the victor who, in a fair fight, has met and overcome his senior. But, it is nauseating in the extreme to see a callow youth, blinded by excessive egotism, who so far forgets the common amenities of life as to offer discourtesies to age. Modesty invariably bespeaks merit. Learning and skill are not in any way handicapped or impeded by a decorous demeanor, and standing at the bar can never be acquired by a supercilious treatment of opposing counsel, be they young or old.

319. OBSERVANCE OF AGREEMENTS. In the active practice of law attorneys are necessarily obliged to make many agreements, stipulations and engagements. Some of these are made in open court, and, becoming a part of the record, are enforcible in any event. But many are made out of court, and in such a manner as to be binding only in conscience. These latter are based on the mutual respect of the contracting parties for each other and the confidence they respectively feel in the other's integrity.

[13] Brown's, Forum, Vol. 2, p. 48.

To inspire and retain this feeling on the part of his confreres should be a prime object with every practitioner, for, as has been well said, "a very great part of a man's comfort, as well as of his success at the bar, depends upon his relations with his professional brethren."[14]

320. To attain this end it is imperative that every engagement be punctually kept, that every agreement be faithfully performed, and that every stipulation be fairly and honestly carried out. The man who thus acquires the reputation of scrupulous exactness in all matters involving professional confidence will find that many of the asperities of practice will be softened, that many of its amenities will be voluntarily tendered, and that, in the general good will, esteem, and respect of his fellow practitioners, he will experience a sense of pleasure that nothing else can create.

321. It is an easy matter sometimes to repudiate engagements made *"in pais,"* and to deny promises so given. The momentary advantage may blind the moral vision, and because no summary punishment follows the counsel has no fear. But once let a man's truthfulness be even suspected his path becomes a thorny one, and where his falsehood and duplicity is established he becomes a professional outcast. No one will trust him, even though he is acting honestly, and if he is at all sensitive he is continually chagrined and mortified by the pre-

[14] Sharswood, Legal Ethics, 73.

cautions taken by those who are thrown in contact with him.

322. SERVICES FOR ATTORNEYS. Lawyers are frequently called upon to render services for each other, both in personal matters and suits of clients. Should compensation be demanded for such services or should they be regarded as professional courtesies for which no reward is expected? It would seem that in former days no charge was made for a service of this kind, and this, to some extent, is the prevailing practice at present. The general sentiment would seem to be that casual and slight services should be rendered by one attorney to another without charge, particularly in his personal cause, but when the service goes beyond this an attorney may be charged the same as other clients.[15] It has further been declared that ordinary advice and services to the family of a deceased attorney should be rendered without charge in most instances; and that where the circumstances make it proper to charge, the fees should generally be less than in case of other clients.[16] This is in keeping with the ancient traditions of the bar, and the only consistent course among the members of a class that calls itself a fraternity and professes for each other a fraternal regard.

323. SUITS AGAINST ATTORNEYS. A retainer may properly be accepted in a suit against an attor-

[15] Graydon v. Stakes, 24 S. C. 483.

[16] Code, Ala. Bar Assn. sec. 52.

ney, yet, as a rule, it should be received reluctantly and the matter settled, if possible, in an amicable manner. The principle of professional fraternity, as far as it will apply, should characterize all proceedings of this nature, particularly where no moral turpitude is involved. This has long been the settled rule of the ethical code and is still in force, notwithstanding its non-observance by the legal tradesmen.

324. INTERFERENCE. It is a maxim of trade that every man is at liberty to compete for business in the open market and to secure customers whereever and however he can, without regard to others. This spirit seems, to some extent, to have entered the legal profession, and the methods of the commercial world are frequently employed by men who claim to represent "advanced" ideas in the transaction of legal business. But the lawyer is not a tradesman, neither do the maxims of commerce apply to his profession. He may not resort to many things that the vendor of wares may do with impunity, and, among these we find the enticement of clients. An attorney who interferes, directly or indirectly, with the professional relations subsisting between other attorneys and their clients commits a gross violation of the long-established etiquette of the bar. Nothing, perhaps, more distinctly stamps the character of the shyster, than offers of service or advice in pending matters then being conducted by other counsel; and nothing more unmistakably betrays the

narrow and unprincipled man, than voluntary criticisms of the acts of a party's attorney. Therefore, the honorable and self-respecting practitioner will never voluntarily tender his services nor obtrude his advice in a matter of this kind, and, if appealed to, will be most conservative in his utterances and guarded in his expressions.

325. SUBSTITUTION OF ATTORNEYS. With respect to the substitution of attorneys there has always existed a most punctilious etiquette. As a rule, the client is at liberty to dismiss his attorney, and to procure another in his place, at his mere pleasure.[17] Nor does the second attorney violate any principle of professional courtesy simply by accepting a retainer under such circumstances. But, if he shall suggest the change, or actively and directly influence the client in making same, except under very extraordinary circumstances, he commits an act unworthy of any honorable practitioner.

326. It will often happen that a client becomes dissatisfied with his legal adviser for no just cause, or through some caprice, or for some fancied neglect or inattention. In such event he applies to other counsel with a recital of his attorney's failings or misdeeds. Under such circumstances the counsel thus applied to should in an honest and manly way inform the client that his fears are unfounded, and

[17] Re Paschal, 10 Wall (U. S.) 483; Ogden v. Devlin, 45 N. Y. Sup. Ct. 631; and see, Knox v. Randall, 24 Minn. 479.

that his attorney is faithfully discharging his duty. There is no other course consistent with honorable professional character or fair dealing, and a man who acts otherwise must not only sink in his own estimation but in the estimation of all of his professional brethren to whom the facts shall become known.

327. But, as before remarked, it is a privilege of the client to change his counsel in his own discretion, and, if, in the exercise of this privilege, he applies to another and tenders a retainer, such retainer, in a proper case, may be accepted. If, upon such offer, it shall appear that the original attorney has a contingent interest in the case, or if there are unpaid fees, which in justness he should receive, or if there are any other unsettled matters growing out of the relations of the parties that would be prejudiced by such change, then there is a duty incumbent on the second attorney to see that all of these matters are satisfactorily adjusted before he assumes charge, and in the event of the client's refusal he should decline the retainer. This has been the uniform practice of all respectable attorneys from time immemorial, and its strict observance is not only in consonance with good morals, but indispensable to the preservation of that feeling of fellowship and fraternity which should always characterize the bar.

328. Where there has been a palpable misman-

agement by the original attorney, involving no moral turpitude, while the circumstances may demand an immediate and summary change of counsel, yet this should be accomplished in a courteous manner and the unsettled matters between the parties may be left for subsequent adjustment. Where the facts disclose unmistakable dishonesty, or gross derelictions, on the part of the attorney, he is entitled to no considerations of respect and may be treated the same as any other violator of confidence.

329. Where the client has seen fit to change his counsel, and has discharged his pecuniary and other obligations to his original attorney, such attorney, upon request made, should deliver over to the second attorney all documents and papers in his possession that rightfully pertain to the case, and sign a consent for substitution on the record if the case is then pending in court. He may properly withhold such papers as relate only indirectly to the matter, as briefs of authorities, order of proof, etc., or may demand an additional compensation for them in case they are desired. But in no event would he be justified in withholding information proper to be communicated or necessary to be known by the second attorney.

330. CONCLUSION. The foregoing pages but imperfectly present a few of the many phases of professional conduct, and the course that should be pursued under given circumstances. As remarked

at the beginning, to prescribe minute and detailed specifications of an attorney's duties upon all occasions is an impossible task; nor are such specifications necessary. No more has been attempted than the recital of a few broad precepts, a few well-settled general rules, and a few confirmed usages. The attorney's own moral sense must supply the rule for the particular case whenever the necessity for it may arise.

331. The exercise of the advocate's profession is attended with many temptations and dangers, and none but the morally strong may withstand them. But, to the really good man, its practice brings renewed strength, courage, prudence, and fortitude. The advocate's profession has ever been considered one of honor, but to be so in fact it must be one of virtue. Fidelity is its great characteristic; truthfulness is its inseparable incident; sympathy is its underlying principle. Indeed, it has been said that the chief excellence of the advocate is in proportion to the facility with which he can become a party in the most momentous concerns of strangers, and identify his own existence, for the time, with the crises of alien fortunes. The very practice of representing the feelings of others is, at least, one remove from self-love, and, however far from approaching the comprehensiveness of true humanity, breaks the crust of selfishness which courses of worldly success in other occupations too often en-

gender. Nor is a pliancy of character thus fostered unfavorable to the maintenance of personal consistency, for, to the properly trained mind, the very habit of rapidly passing from one range of sympathies to another begets an earnest aspiration after conditions which are stable and enduring, and but fixes the roots of individual principles deeper.

APPENDIX.

A.

SIR MATTHEW HALE'S RULES.

In the year 1660, Sir Matthew Hale was appointed Chief Baron of the Exchequer, on which occasion he laid down a series of rules for the government of his conduct, that, Lord Campbell said, "Ought to be inscribed in letters of gold on the walls of Westminster Hall, as a lesson to those entrusted with the administration of justice." While they refer to the judicial office they have yet a significance for the bar, and writers upon legal ethics have, in many instances, incorporated them in their works. The rules are as follows:

"*Things necessary to be continually had in remembrance.*

"1. That in the administration of Justice, I am intrusted for God, the king, and country; and, therefore,

"2. That it be done, 1, uprightly; 2, deliberately; 3, resolutely.

"3. That I rest not upon my own understanding or strength, but implore and rest upon the direction and strength of God.

"4. That in the execution of justice I carefully lay aside

my own passions, and not give way to them, however provoked.

"5. That I be wholly intent upon the business I am about, remitting all other cares and thoughts as unseasonable, and interruptions.

"6. That I suffer not myself to be prepossessed with any judgment at all, till the whole business and both parties be heard.

"7. That I never engage myself in the beginning of any cause, but reserve myself unprejudiced till the whole be heard.

"8. That in business capital, though my nature prompt me to pity, yet to consider there is a pity also due to the country.

"9. That I be not too rigid in matters purely conscientious, where all the harm is diversity of judgment.

"10. That I be not biassed with compassion to the poor, or favor to the rich, in point of justice.

"11. That popular or court applause, or distaste, have no influence in anything I do, in point of distribution of justice.

"12. Not to be solicitous what men will say or think, so long as I keep myself exactly according to the rule of justice.

"13. If in criminals it be a measuring cast, to incline to mercy and acquittal.

"14. In criminals that consist merely in words, where no more harm ensues, moderation is no injustice.

"15. In criminals of blood, if the fact be evident, severity is justice.

"16. To abhor all private solicitations, of what kind soever, and by whomsoever, in matters depending.

"To charge my servants—1, Not to interpose in any matter whatsoever; 2, Not to take more than their known fees; 3, Not to give any undue precedence to causes; 4, Not to recommend counsel.

"18. To be short and sparing at meals, that I may be the fitter for business."

In 1671, Hale was appointed Lord Chief Justice of the Court of Kings Bench. After he had occu-

pied this position for about four years he was seized with an inflammatory attack from which he never recovered. During this illness he determined to resign, but previous to taking so important a step he composed the following meditation on the aspect of his affairs:[1]

"If I consider the business of my profession, whether as an advocate or as a judge, it is true I do acknowledge by the institution of Almighty God, and the dispensation of His providence, I am bound to industry and fidelity in it. And it is an act of obedience unto His will, it carries with it something of religious duty, and I may and do take comfort in it, and expect a reward of my obedience to Him and the good that I do to mankind therein from the bounty and beneficence and promise of Almighty God; and it is true also, that without such employments civil societies cannot be supported, and great good redounds to mankind from them, and in these respects the conscience of my own industry, fidelity, and integrity in them, is a great comfort and satisfaction to me. But yet I must say, concerning these employments, considered simply in themselves, they are very full of cares, anxieties, and perturbations. 2dly. That though they are beneficial to others, yet they are of the least benefit to him that is employed in them. 3dly. They do necessarily involve the party whose office it is in great dangers, difficulties, and calumnies. 4thly. That they only serve for the meridian of this life, which is short and uncertain. 5thly. That though it be my duty faithfully to serve in them while I am called to them, and till I am duly called from them, yet they are great consumers of that little time we have here, which, as it seems to me, might be better spent in a pious contemplative life, and a due provision for eternity."

[1] See, Campbell's, Lives of the Chief Justices.

B.

CHIVALRY OF ADVOCACY.

Mr. Forsyth, in his interesting history of advocacy, has shown the chivalric sentiment that permeated the old French Bar. This, however, seems in some measure to have been the result of positive regulations, for the French advocate, unlike his brother in England, was not left entirely to his own discretion in matters of professional morality. The practice was regulated by frequent royal edicts, and conformity thereto was enforced under pain of being disbarred. In time these matters assumed the shape of a code, which remained in force until the revolution in 1790, when the order of advocates, along with other institutions, was abolished. Among the prohibitions and restraints to which the old French lawyer was subjected we find the following:

"1. He was not to undertake just and unjust causes alike, without distinction; nor maintain such as he undertook with trickery, fallacies, and misquotations of authorities.

"2. He was not in his pleadings to indulge in abuse of the opposite party or his counsel.

"3. He was not to compromise the interests of his clients, by absence from court when the cause in which he was retained was called on.

"4. He was not to violate the respect due to the Court, by either improper expressions or unbecoming gestures.

"5. He was not to exhibit a sordid avidity of gain, by putting too high a price upon his services.

"6. He was not to make any bargain with his client for a share in the fruits of the judgment he might recover.

"7. He was not to lead a dissipated life, or one contrary to the modesty and gravity of his calling.

"8. He was not, under pain of being disbarred, to refuse his services to the indigent and oppressed.."

Commenting upon the foregoing Mr. Forsyth says:

"Throughout these rules we see that the analogy of knighthood is preserved, and the last breathes the very spirit of chivalry. Purity of life, and disinterested zeal in the cause of the poor and friendless, were enjoined upon the cavalier and advocate alike; and doubtless the resemblance between the two professions, of which the latter was thus reminded, had a powerful effect in producing a tone of high-minded feeling, which ought ever to be the characteristic of the Bar. But sometimes this resemblance was carried further than was either safe or agreeable, and the advocate had to perform a warlike office, not in a figurative, but a literal sense. I allude to the appeal or wager of battle, whereby the sword was made the arbiter of disputes, and sanguinary duels were solemnly sanctioned by Courts of law."

C.

DEFENSE OF COURVOISIER.

In the year 1840 there occurred in England a remarkable criminal trial in which were developed several principles of legal ethics that have ever since continued to secure a recognition by the bar. A man named Courvoisier was arraigned for the murder of his master, Lord Russell.

He was defended by a Mr. Phillips. During the course of the trial Courvoisier confessed his guilt to his counsel, who, notwithstanding, continued the defense. The conduct of Mr. Phillips was severely criticised, and the case was the subject of much comment at the time. Several years afterwards the matter was again brought into publicity by a newspaper attack. This led to a published statement by Phillips, of the circumstances attending the trial, from which is extracted the following:

"It was on the second morning of the trial, just before the judges entered, that Courvoisier, standing publicly in front of the dock, solicited an interview with his counsel. My excellent friend and colleague, Mr. Clarkson and myself, immediately approached him. I beg of you to mark the presence of Mr. Clarkson, as it will become very material presently. *Up to this morning I believed most firmly in his innocence;* and so did many others as well as myself. 'I have sent for you, gentlemen,' said he, 'to tell you I committed the murder!' When I could speak, which was not immediately, I said: 'Of course, then, you are going to plead guilty?' 'No, sir,' was the reply; 'I expect you to defend me to the utmost.' We returned to our seats. My position at this moment was, I believe, without parallel in the annals of the profession. I at once came to the resolution of abandoning the case, and so I told my colleague. He strongly and urgently remonstrated against it, but in vain. At last he suggested our obtaining the opinion of the learned judge who was not trying the cause upon what he considered to be the professional etiquette under circumstances so embarrassing. In this I very willingly acquiesced. We obtained an interview, when Mr. Baron Parke requested to know distinctly whether the prisoner insisted on my defending him; and, on hearing that he did, said I was bound to do so, *and to use all fair arguments arising on the evidence.* I therefore

retained the brief; and I contended for it, that very argument I used was a fair commentary on the evidence, though undoubtedly as strong as could I make them. I believe there is no difference of opinion now in the profession that this course was right. It was not till after eight hours of my public exertion before the jury that the prisoner confessed; and to have abandoned him then would have been virtually surrendering him to death."

The general sentiment of the profession has fully sustained the counsel in the position he assumed, of retaining the brief, after learning of his client's guilt, and the practice has since been followed, both in England and America. It is contended, in support of this position, that no advocate, who has accepted a retainer to defend a person charged with crime, is at liberty to break his contract because he finds the prisoner to be guilty; that it is no part of such contract that the prisoner is innocent; that guilty men have the same right to be defended as others, and that this right is only in furtherance of public justice, which demands that no one shall be convicted, except on legal and sufficient eviden

The advice given to Mr. Phillips by Baron Parke has also become the standard of professional duty in a case of this kind, and counsel is bound to "use all fair arguments arising on the evidence." But even this rule must be qualified in some respects, for it is possible to keep within it and yet to violate the precepts of righteous conduct. This, it is said by his detractors, is just what Phillips did. It would seem that previously to Courvoisier's confession, and

while the evidence was of a very inconclusive character, he had pursued a line of policy dictated by a belief in his client's innocence. During the whole course of his cross-examinations he made the strongest insinuations that the fellow servants of his client were the perpetrators of the murder, and that the policemen were participators with them in a subsequent conspiracy to throw suspicion on the prisoner, chiefly by placing a pair of blood-stained gloves in his valise, which were not discovered until after he was sent to prison. All of this made it extremely difficult to follow Baron Parke's advice. To use *after* the confession "all fair arguments arising on the evidence" which was elicited *before* the confession, was all but impossible. What would have been fair before became unjustifiable afterward. The task of selecting and rejecting, of deciding what might and what might not be used, would have puzzled the best mind even after long and careful consideration, and, it would seem, in the excitement of the trial Mr. Phillips failed to discriminate between them. It is asserted that in his arguments he not only proclaimed his own belief in his client's innocence, but still attempted to impute the crime to the other servants, finally closing by a threat to the jury in the following peroration:

"*I speak to you as a friend, as a fellow-Christian,* and I tell you, that if you do not act in the spirit which I have called upon you to do, *that the deed of to-day will never die within you.* If you should pronounce your decision without that

deep and profound consideration of its awful import, the error which you have fallen into *will pursue you with remorse to the latest period of your existence, and stand against you in condemnation before the judgment-seat of your God. So beware what you do.*"

Notwithstanding a vigorous denial by Mr. Phillips and his friends of the charges last recited, it would yet seem, from the reports in the public press, that they were substantially true as alleged, and his conduct has furnished a fruitful theme for much subsequent condemnatory writing by the moralists. While we must make due allowance for him on account of the positive obligation he was under to pursue the defense and the superlative difficulty under which he labored in so doing, we must yet agree with the critics in their assertion that, a counsel who so far forgets his office as to support falsehood, or even to distort the evidence, violates—not follows—his duty as an advocate.

The deductions to be drawn from the Courvoisier case may be summarized as follows:

An attorney is bound to retain a case and continue the defense, notwithstanding he may ascertain during the course of the trial that his client is guilty.

It is his duty, even under such circumstances, to screen his client from conviction on insufficient evidence, and to employ in his defense all fair arguments.

He has no right, even though the facts may admit of the possibility of guilt in others, to cast suspi-

cion on the innocent, nor to damage the character of honest witnesses.

He is wholly unjustified in asserting his own belief in his client's innocence, knowing at the time that he is guilty.

D.

LEGAL COMMERCIALISM.

In an address before the Section of Legal Education of the American Bar Association, at its session held in the year 1894, the illustrious author and jurist, Hon. John F. Dillon, while discussing the features of "The true professional ideal," made the following pertinent remarks:

"There is, I fear, some decadence in the lofty ideals that have characterized the profession in former times. There is in our modern life a tendency—I have thought at times very strongly marked—to assimilate the practice of the law to the conduct of commercial business. In great law firms with their separate departments and heads and subordinate bureaus and clerks with their staff of assistants, there is much resemblance to the business methods of the great mercantile and business establishments situate close by. The true lawyer—not to say the ideal lawyer—is one who begrudges no time and toil, however great, needful to the thorough mastery of his case in its facts and legal principles; who takes the time and gives the labor necessary to go to its very bottom, and who will not cease his study until every detail stands distinct and luminous in the intellectual light with which he has surrounded it. The temptations and exigencies of a large practice make this very difficult, and the result too generally is that the case gets only the attention that is

convenient instead of that which it truly requires. The head of a great firm in a metropolitan city, a learned and able man, was associated with another in a case of much complexity and moment. He expressed warm admiration of the printed argument of his associate counsel, which had cost the latter two months of laborious work, adding, however, that he could not have given *that* much time to it because, commercially regarded, it would not have paid him to do so."

"It is unquestionably the duty of the profession to preserve the traditions of the past—to maintain its lofty ideals —and to this end to guard against what I may perhaps truly describe by calling it the 'commercializing' spirit of the age. The utterance of Him who spake with an authority greater than that of any lawyer or judge, 'Man lives not by bread alone,' should never be forgotten or unheeded by the lawyer, and will not be by any who comes within the category of what may be termed the 'Ideal Lawyer.' "

E.

ETHICS A REQUIREMENT OF LEGAL EDUCATION.

As previously remarked in the body of this work, the subject of Legal Ethics, as a required study, has for some time past engaged the attention of lawyers and legal educators. At the session of the American Bar Association, held in 1894, the matter was forcibly presented by Mr. Edmund Wetmore, in a paper on the "Requirements of Legal Education," from which the following excerpt is made:

"Closely allied to the study of the principles upon which the law rests is the question of legal ethics. The influences that make not only a capable but an honest and honorable

lawyer are derived primarily from individual disposition and character, from home training, from the standard of right and wrong that prevails in the bar and the community in which he lives; but of such paramount importance is it, not only to lawyers themselves, but to the State and to society, that a high standard of professional conduct and character should be maintained, that I believe that every law course would be improved that should include a brief series of lectures from those whose own lives and character entitle them to speak with authority, the object of which should be to impress upon the young men entering the profession that the highest requirement of a legal education is to make a practitioner whose word is as sacred as an oath, and who would no more seek to impose upon a Court, to bring a questionable suit, or to seek success by resort to other influences than evidence and argument, than he would enter the court room to ply the trade of a pickpocket. If in every college there is a chair of moral philosophy, I can see no reason why there should not in every law school be a chair of legal ethics."

The suggestion was received with much favor by the association and at the meeting, held the year following, the Committee on Legal Education, through its chairman, Dr. Austin Abbott, presented a report in which, among other things, may be found the following:

"The Committee would recommend, in accordance with a suggestion made in a paper read before the Section of Legal Education at its last meeting, that a course upon Legal Ethics be introduced in the law school curriculum. It is remarkable that this has been already done in so few schools; and it is unnecessary to argue the need of a knowledge of legal ethics by the bar, or the propriety of instruction on this subject in our law schools in order that their graduates may enter the profession with correct ideas

of the duties and responsibilities of practitioners to one another, to their clients, to the courts, and to the public. Such instruction from those whom they had learned to respect and revere could not but have a lasting influence when received by young men at a time when their minds would be peculiarly impressionable, and might save them from serious errors due to want of knowledge and experience."

"It may be said that there is no need of special instruction on legal ethics as a distinct part of a course of legal study; that the proprieties of professional conduct can be dwelt on incidentally during the study of equity, evidence, criminal law, and other topics; that the whole law course should be pervaded, as it were, with the inculcation of what constitutes the true professional ideal—the highest standards of truth, and honor, and morality; that this is the best method of teaching professional ethics, and renders any further instruction unnecessary. We agree that the true teacher will lose no occasion to point out to his pupils the principles which should guide them amid the perplexities and embarrassments of professional life; but it could not but be useful near the close of their career as students to bring together the disconnected threads, and in a brief course of lectures (for here probably all will agree, instruction by cases or by text-books will not alone accomplish the object, nor will fear of examinations be the best stimulus to attention) warn them of the pitfalls which will beset their way, and, with genuine solicitude and sympathy, make plain to them the path of duty, of honor, and of safety."

"Such a course would give to the student a more clear and definite conception of the function of the lawyer, as being in its highest aspect the pursuit of truth whether in questions of fact or of law. It would show him the noble scope for a just partisanship for his client within the honorable limits of his duty to the court, to the public, and to the State. It would enhance the wholesome influence upon him of a sense of responsibility as an offier of the court, and would enlarge his appreciation of the public influence which honorable service at the bar always brings."

"Is it not plain that without specific attention to this

subject a course in law, however extended and technical, will leave many students on a low grade? It is not a branch which requires time in proportion to its importance, and on this very account perhaps has been too much neglected. In some schools it may be thought best to treat the subject by touching upon it at various points in the course of other subjects which suggest it; in others it may be thought best to devote a short period to its distinctive discussion, but in whatever way it is done we believe that some clear and definite class work upon the rights, the duties and the responsibilities of members of the bar would be found an immediate advantage in legal education."

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